92-1383

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DONALD F. BOGUE,

Petitioner,

v.

AMPEX CORPORATION AND ALLIED-SIGNAL, INC.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Two questions are presented. The second question need only be addressed if the first question is answered in the affirmative.

Question 1: Does ERISA (Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq.) preempt state law where a parent corporation establishes a program to pay special incentive compensation to a small number of senior executives employed by its subsidiary corporation for the purpose of inducing the executives to assist the parent in a sale of the subsidiary?

Question 2: If the answer to question 1 is affirmative, should the district court review de novo the parent corporation's denial of an executive's claim for a severance payment under the special compensation program where the program documents do not state that the parent could exercise discretion in determining the executive's claim or in construing the terms of the program?

PARTIES TO THE PROCEEDINGS

The petitioner is DONALD F. BOGUE, plaintiff/appellant in the courts below. The respondents are ALLIED-SIGNAL, INC. ("Allied-Signal"), a publicly-owned corporation, and AMPEX CORPORATION ("Ampex"). Ampex was wholly-owned by Allied-Signal until May 1987 when it was purchased by the Newhill Acquisition Corporation. Ampex is now owned by N.H. Holding, Incorporated.

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PETITION FOR WRIT OF CERTIORARI

DONALD F. BOGUE ("Bogue"), petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The United States District Court for the Northern District of California granted Respondents' Motion for Summary Judgment on all of Petitioner's claims in district court. *Bogue v. Ampex Corp.*, 750 F.Supp. 424 (N.D. Cal. 1990) (App., *infra*, 16a-31a). This district court opinion was affirmed on appeal by the United States Court of Appeals for the Ninth Circuit. *Bogue v. Ampex Corp.*, 976 F.2d 1319 (9th Cir. 1992) (App., *infra*, 1a-15a).

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was filed October 7, 1992 and amended December 2, 1992. Petitioner's Petition for Rehearing in the Court of Appeals for the Ninth Circuit was denied on November 23, 1992. (App., *infra*, 34a.) A Petition for Writ of Certiorari is due February 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved in general are set forth in the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. ("ERISA"). Specifically, 29 U.S.C. § 1144(a) provides in pertinent part:

> [t]his chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title . . .

29 U.S.C. § 1003(a) provides in pertinent part:

> [t]his subchapter shall apply to any employee benefit plan if it is established or maintained (1) by any employer engaged in commerce . . .

29 U.S.C. § 1002(5) defines the term "employer" as follows:

> [t]he term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

29 U.S.C. § 1002(3) defines "employee benefit plan" as follows:

> [t]he term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

The term "employee welfare benefit plan" is defined at 29 U.S.C. § 1002(1). Because of its length, its pertinent text is set forth in Appendix F pursuant to rule 14.1(f) of the rules of this Court. (App., *infra*, 41a-44a.)

29 U.S.C. § 1002(2)(A) defines "employee pension benefit plan" in pertinent part as follows:

> [a]ny plan, fund, or program which was or is hereafter established or maintained by an employer, or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—
>
> (i) provides retirement income to employees, or
>
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond . . .

STATEMENT OF THE CASE

A. Statement of Facts.

Bogue was employed by Ampex from September 1976 until February 1988. During 1986 and 1987, Ampex was a wholly-owned subsidiary of Allied-Signal. Allied-Signal was a large United States corporation which owned many subsidiary corporations, including Ampex.

In 1986 Allied-Signal decided to sell several subsidiaries, including Ampex. In order to induce the key executives of Ampex to help it in selling Ampex, Allied-Signal established what it called the "Allied-Signal/E&I Sector Special Compensation Program for Designated Key Executives" (the "Allied-Signal Special Compensation Program" or the "Program").[1] In November 1986, the Allied-

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[1] The Program was documented by a letter from Allied-Signal to Bogue describing the circumstances under which the compensation would be paid. The full text of the Program is set forth in Appendix E. (App., *infra*, 35a-40a.)

Signal Special Compensation Program was offered to 10 key senior Ampex executives, including Bogue.

The Program had three components: (1) a stay bonus, (2) a sale price incentive, and (3) severance pay. The stay bonus provided for additional bonus compensation to the executives if they stayed in the employ of Ampex during and after the time Ampex was being offered for sale by Allied-Signal. The sale price incentive component provided for a bonus payment to the executive if Allied-Signal was successful in obtaining a sale price for Ampex in excess of $375 million. The amount of the bonus increased by $2,000 for each $1 million in sale price over the $375 million. Finally, the severance pay component of the Program provided for severance pay to the executive if, after the sale of Ampex, the new owners either terminated the executive's employment prior to March 31, 1988, *or* failed to offer the executive employment which was "substantially equivalent" to the employment held by the executive when Ampex was owned by Allied-Signal.

During May 1987, Allied-Signal sold Ampex to the Newhill Acquisition Corporation for substantially more than $375 million. Bogue remained employed by Ampex during the sale process and Allied-Signal paid him his stay bonus compensation. Because the sale price exceeded the $375 million threshold level set by Allied-Signal, Bogue received his sales price compensation under the sale price incentive component of the Program.

After the new owners took control of Ampex, they instituted a major corporate reorganization which changed the nature of Bogue's position from the vice president and general manager of its Audio-Video Systems Division to a newly-created position in charge of a sales and marketing group. Bogue informed the new owners that this employment was not "substantially equivalent" to the employment he held when Ampex was owned by Allied-Signal. Bogue then requested his severance compensation from Allied-Signal under the Program. Allied-

Signal denied Bogue's claim for the severance compensation contending that the new owners of Ampex had, in fact, offered him "substantially equivalent employment."

The term "substantially equivalent employment" is defined in the Program as a job having all of the following: (1) a 90 percent equivalent salary, (2) a location not more than 50 miles from Redwood City, California, and (3) "responsibilities similar" to the responsibilities held by the executive when Ampex was owned by Allied-Signal (App., *infra*, 39a-40a). Bogue claimed that the new job did not have "responsibilities similar" to the job he held when Ampex was owned by Allied-Signal and the new owners had, therefore, failed to offer him "substantially equivalent" employment. Allied-Signal disagreed and this litigation followed.

B. Proceedings in the Courts Below.

Bogue initially filed suit in the California Superior Court, San Mateo County, alleging claims for breach of contract. Respondents removed the action to the Federal District Court for the Northern District of California on the basis of ERISA preemption (29 U.S.C. 1144(a)). Respondents then moved for summary judgment based on ERISA preemption and Bogue moved for a remand to state court. The district court ruled, in an unpublished decision, that ERISA applied to the Allied-Signal Special Compensation Program and Bogue's state court remedies were preempted.[2] The court dismissed Bogue's complaint with leave to amend to state claims under ERISA.

After Bogue amended his complaint to seek relief under ERISA, the district court granted respondents' second motion for summary judgment, holding that Allied-Signal had not abused its discretion in denying Bogue's claim (*Bogue v. Ampex Corp.*, 750 F.Supp. 424 (N.D.

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[2] The order of the district court is set forth in full at Appendix C. (App., *infra*, 32a-33a.)

Cal. 1990). The district court denied Bogue's request for a trial de novo, holding that Allied-Signal had discretionary authority to decide Bogue's claim under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). The full text of the district court's opinion is set forth at Appendix B. (App., *infra*, 16a-31a.)

Bogue appealed this decision to the United States Court of Appeals for the Ninth Circuit on various grounds including, inter alia: (1) that the Allied-Signal Special Compensation Program is not an ERISA employee benefit plan and, therefore, his state-law based claims should not have been preempted, and (2) if the Program is an ERISA employee benefit plan, the standard of review in the district court should have been de novo and not abuse of discretion. The Ninth Circuit affirmed, holding that the Program is an ERISA employee benefit plan within the meaning of 29 U.S.C. § 1144(a); therefore, Bogue's state-law claims and remedies were preempted. The court also affirmed the district court's holding that Bogue was not entitled to de novo review because Allied-Signal had discretionary authority to decide Bogue's claim. (*Bogue v. Ampex Corp.*, 976 F.2d 1319 (9th Cir. 1992).) The full text of the court of appeals' opinion is set forth at Appendix A. (App., *infra*, 1a-15a.)

C. Basis for Jurisdiction in the Court of First Instance.

Federal court jurisdiction in the first instance is disputed. Bogue contends that there is no basis for federal jurisdiction in the first instance. Bogue filed his complaint in state court and it was removed to federal district court by respondents under the claim of ERISA preemption. The district court and the court of appeals agreed with respondents and found federal question jurisdiction under ERISA. Under Question No. 1, Bogue requests that this court review the judgment below that ERISA provided federal jurisdiction to remove his action from state court. There is no other basis for federal court jurisdiction.

REASONS FOR GRANTING THIS PETITION

I. INTRODUCTION.

This petition presents two major issues. The first issue involves the question of ERISA preemption in a special executive compensation program. Consideration of this issue requires that a distinction be made between a "compensation plan" which is not governed by ERISA, and an "employee benefit plan" which is governed by ERISA. It also requires consideration of how much of an administrative scheme is required to make a plan or program subject to the preemption rule of *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). By holding that the Program is subject to ERISA, the Ninth Circuit has split with the Fifth Circuit. (See, *infra*, pp. 8-13.)

If this Court determines that the Program is an "employee benefit plan" under ERISA, then the Court should also determine the appropriate standard of review of Bogue's claim in the district court. The rule on standard of review was announced by this Court in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989). Since *Firestone*, there has been a significant conflict in the circuit courts in interpreting this Court's rule of "discretionary authority" as an exception to de novo review. (See, *infra*, pp. 14-20.)

II. THE PREEMPTION ISSUE.

Question No. 1 presents the important issue of whether Congress intended ERISA to apply to incentive compensation programs related to corporate acquisitions and mergers. Specifically, should ERISA preempt state law in a situation where the owner of a corporate enterprise designs an incentive compensation program for a few key executives of its subsidiary for the purpose of providing the executives with a financial incentive to assist the owner in its sale of the subsidiary?

The acquisition and merger of large corporations is commonplace in corporate America. Executive incentive compensation programs designed to aid the purchase and sale process are typically found in such transactions. Whether the detailed federal scheme of ERISA should apply to these programs is of major importance to the employers and employees of this country. There are conflicting opinions in the circuit courts on this issue. This Court should use this case as an opportunity to resolve the conflict and establish a rule for ERISA preemption that draws the line between ERISA employee benefit plans and non-ERISA incentive compensation programs.

A. The Requirement of an Administrative Scheme.

The threshold question on the preemption issue is whether the Allied-Signal Special Compensation Program is an ERISA employee benefit "plan" within the meaning of 29 U.S.C. § 1144(a). ERISA does not define the term "plan" and the circuit courts have found its definition to be "elusive at best." *Williams v. Wright*, 927 F.2d 1540, 1543 (11th Cir. 1991).

The Ninth Circuit in *Bogue* resolved the ERISA "plan" issue by an analysis of the administrative scheme required by the severance pay component of the Program. The Court held that the decision-making requirements of the Program established a sufficient administrative scheme to satisfy the rule established by this Court in *Fort Halifax*. In *Fort Halifax*, this Court held that there is no preemption if there is "no need for an ongoing administrative program for processing claims and paying benefits." *Id.*, at 12.

By holding that the Program had a sufficient administrative scheme to make it an ERISA "plan," the Ninth Circuit has split with the Fifth Circuit on this issue. The Fifth Circuit found no administraitve scheme and no ERISA "plan" within the meaning of *Fort Halifax* under a General Motors Voluntary Termination of Employment

Plan where General Motors made lump sum or two-year installment payments to employees who elected to cease working for G.M. *Wells v. General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989), *cert. denied*, 495 U.S. 923 (1990). The court reasoned that payment of severance benefits to large numbers of employees over a two-year period did not require the type of administrative scheme described in *Fort Halifax*.

The Fifth Circuit also held that a "golden parachute" severance pay plan triggered by a corporate takeover was not an ERISA "plan" because it had payment provisions similar to those found in *Wells* and did not require an administrative scheme. *Fontenot v. NL Indus., Inc.*, 953 F.2d 960 (5th Cir. 1992).[3]

In conflict with the Fifth Circuit is the Third Circuit in *Pane v. RCA Corp.*, 868 F.2d 631 (3rd Cir. 1989). *Pane* held that a similar executive severance program designed to retain key executives during merger negotiations was an ERISA plan. Without explanation, the court simply stated that an administrative scheme was required. *Id.*, at 635. In distinguishing *Pane*, the Fifth Circuit in *Fontenot* stated: "[s]urely, *Pane* does not stand for the proposition that every 'golden parachute' is an ERISA plan." *Fontenot* at 962-63.

Recognizing the conflict between the Fifth Circuit in *Wells* and the Third Circuit in *Pane*, the Ninth Circuit in *Bogue* followed the Third Circuit in holding that the Program was an ERISA "plan." *Bogue*, at 1323. Because Allied-Signal would be required to use its judgment

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[3] The severance plan in *Fontenot* was similar to the Allied-Signal Special Compensation Program except that it was triggered by a hostile takeover. These programs are typically referred to as "golden parachutes." (In *Fontenot*, the plan was called the "Senior Executive Severance Plan.") The Allied-Signal Special Compensation Program was a "golden handcuffs" program, not a "golden parachute," because payments were triggered by a negotiated, non-hostile sale of Ampex.

in determining Bogue's claim, the Ninth Circuit reasoned that this amounted to discretionary authority and an administrative scheme that took the Program outside the ambit of *Fort Halifax* and *Wells*. *Bogue*, at 1323.

This Court should use this case as an opportunity to resolve the conflict and state a rule of law which defines the scope of an administrative scheme necessary for ERISA preemption under *Fort Halifax*.

B. The Issue of Employer Purpose in Establishing the Plan.

This petition also presents the question of where to draw the line between an executive compensation program and an ERISA employee benefit plan. The Allied-Signal Special Compensation Program has features which bring the issue into sharp focus and this Court should use this case to establish a rule of law distinguishing the two forms of employee benefits. This Court has not yet ruled on this issue, and the Ninth Circuit has now split with the Fourth, Fifth and Eleventh Circuits by holding that the Allied-Signal Program is an ERISA employee benefit plan.

The leading case on this issue is *Murphy v. Inexco Oil Co.*, 611 F.2d 570, 575-76 (5th Cir. 1980). The *Murphy* court looked to the purpose of the employer in creating a plan for discretionary incentive bonus payments which were likely to extend beyond the term of employment or death of the employee. The court held that where the employer (Inexco) intended the plan to reward its employees for current services, it is not an ERISA plan even if the employees or their heirs are likely to continue collecting payments after retirement or death. The *Murphy* court analyzed the plan in question under both the test of an "employee welfare benefit plan" (29 U.S.C. § 1002 (1)) and the test of an "employee pension benefit plan" (29 U.S.C. § 1002(2)) and held that the Inexco plan was neither. *Id.*, at 574-576. The court held that the crucial factor is the *purpose* of the employer in establishing the

plan. If the primary purpose is to provide post-employment benefits, it is an ERISA plan. If the primary purpose is to provide an incentive for current services, it is not an ERISA plan, even if it incidentally provides for post-employment benefits. *Id.*, at 574-576.

The Eleventh Circuit has followed the Fifth Circuit by holding that a compensation plan is an ERISA plan if it was designed for the primary purpose of providing retirement income. If post-retirement income is only incidental to an employment contract, it is not an ERISA "plan." *Williams v. Wright*, 927 F.2d 1540, 1547 (11th Cir. 1991).

Similarly, *Fraver v. North Carolina Farm Bureau Mut. Ins. Co.*, 801 F.2d 675 (4th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987), involved payment of insurance commissions in monthly installments for five years after employment termination. The Fourth Circuit held that this was not an ERISA plan because the plan was in the nature of an employment or agency contract that provided for a final commission payable over a number of years after the employment terminated. *Id.*, at 678. The fact that payments were made after termination of the relationship did not create an ERISA "plan."

In *Bogue*, the Ninth Circuit held that an ERISA plan existed without analyzing the purpose of Allied-Signal in establishing the Program. Instead, the Ninth Circuit considered only the severance pay component of the Program because it was the only component that was not paid to Bogue. *Bogue*, at fn. 3. However, the Program as a whole shows that the clear purpose of Allied-Signal in establishing the Program was to create a financial incentive to the Ampex executives to provide current services for the benefit of Allied-Signal in its proposed sale of Ampex.[4]

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[4] Petitioner raised this issue in the Ninth Circuit by arguing that the Program was not established or maintained by Bogue's

A clear conflict now exists between the Ninth Circuit on the one hand in *Bogue*, and the Fourth, Fifth and Eleventh Circuits in *Fraver*, *Murphy* and *Williams* over the proper test for determining whether a special compensation program is an ERISA "plan." This Court has not yet addressed the issue and this petition would afford an opportunity to resolve the conflict and establish the correct rule of law.

This case also presents the important ERISA definitional issue of what constitutes an "employer" under the statute. ERISA plans must be established or maintained by an "employer" or any person acting indirectly "in the interest of an employer" as required by 29 U.S.C. §§ 1003 (a) and 1002(5). Allied-Signal was not Bogue's employer. Moreover, Allied-Signal was clearly acting only in its own self-interest, i.e., to maximize the sale price of Ampex. Although the Ninth Circuit recognized the self-interest of Allied-Signal, it held that it could not be said that the Program was *not* in the interest of Bogue's employer (Ampex). *Bogue*, at fn. 18. However, whether the Program was not in the interest of Ampex is not the issue. ERISA requires an affirmative finding that a plan was established or maintained either: (1) by an employer, or (2) in the interest of an employer. 29 U.S.C. § 1002(5). The Ninth Circuit made no holding that the Program was "in the interest" of the employer. It only held there was no showing that it was *not* in the interest of the employer (*Bogue*, at fn. 18) and that the new owners of Ampex agreed to pay any amounts Allied-Signal determined to be due. *Bogue*, at 1324. The plain purpose of the Pro-

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employer (Ampex) or anyone acting on behalf of Bogue's employer, as required by 29 U.S.C. §§ 1003(a) and 1002(5). The Ninth Circuit dismissed this claim by holding that the Program was established or maintained by the employer because the new owners of Ampex later agreed to fund any payments Allied-Signed found to be due under the Program. Petitioner submits that Ampex's later agreement to fund the Program is irrelevant to the question of who "established or maintained" the Program.

gram was to benefit Allied-Signal and the ten Ampex executives chosen by Allied-Signal to participate in the Program. Ampex, the only employer of Bogue, neither established nor maintained the Program as required for an ERISA employee benefit plan. (29 U.S.C. §§ 1003(a) and 1002(5).)

For the reasons stated above, this Court should grant this petition and provide needed guidance on the proper test for distinguishing between an employee benefit plan that is governed by ERISA and an incentive compensation program that is not.

III. THE PROPER STANDARD OF REVIEW IF ERISA GOVERNS.

If this Court determines that the Allied-Signal Special Compensation Program is an ERISA employee benefit plan, then it should also address the issue of the proper standard of review by the district court of Allied-Signal's denial of Bogue's claim.

A. The Rule in *Firestone*.

In 1989 this Court established the rule that an ERISA claim under 29 U.S.C. § 1132(a)(1)(B) is to be reviewed de novo by the district court "[u]nless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone*, at 115. Since *Firestone*, the circuit courts have issued conflicting opinions on whether the "discretionary authority" must be expressed in the plan documents or can be implied from the plan's facts and circumstances. The Ninth Circuit in *Bogue* is clearly on the "implied" side of the split and has gone further in that direction than any other circuit in finding discretionary authority. The *Bogue* court held that, although the Program makes no mention of discretionary authority to determine eligibility for benefits, discretionary authority existed because the terms of the Program

required Allied-Signal to use a "judgmental function" in deciding whether Bogue was entitled to benefits. *Bogue* at 1325. The Ninth Circuit adopted the district court's ruling and cited no authority from any other circuit for the holding on this point.[5]

Firestone makes clear that discretion is the exception, not the rule. *Anderson v. Great West Life Assur. Co.*, 942 F.2d 392, 395 (6th Cir. 1991). In cases decided after *Firestone*, circuit courts have disagreed over what language is necessary in the ERISA plan to rebut *Firestone's* presumption of de novo review, but no case has gone as far as *Bogue* in denying de novo review where there is no plan language providing a discretionary grant.

B. The Post-*Firestone* Split in the Circuit Courts.

Since *Firestone*, the circuits have divided over whether "generic language" such as the authority to "construe disputed or doubtful terms" confers discretion or merely serves to identify *who* shall decide. See, *Pratt v. Petroleum Production Management, Inc.*, 920 F.2d 651, 658 (10th Cir. 1990) and *Sisters of the Third Order of St. Francis v. SwedishAmerican Group Health Ben. Trust*, 901 F.2d 1369, 1371 (7th Cir. 1990). The First, Second, Fourth, Fifth, Sixth, Seventh and Eighth Circuits require an express grant of discretionary authority, while the Third, Ninth, Tenth, Eleventh and District of Columbia Circuits hold that discretionary authority may be implied. However, no circuit court case—other than *Bogue*—has equated the ERISA administrator's performance of a judgmental function with a grant of discretionary authority.

In *Sisters of the Third Order*, the parties disputed the significance of the SwedishAmerican ERISA plan's lan-

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[5] The court purported to rely on the "virtually indistinguishable" language of the ERISA plan in *Eley v. Boeing Co.*, 945 F.2d 276 (9th Cir. 1991), but that case is clearly distinguishable based on the express grant of "final authority" to Boeing in deciding claims. 945 F.2d at 278, fn. 2. The Program in *Bogue* contains no such language.

guage which included authority "[t]o construe and interpret the Plan, decide all questions of eligibility and determine the amount, manner and time of payment of any benefits hereunder." *Id.*, at 1371. Without deciding the issue, the Seventh Circuit described the split of authority:

> [t]his language might be taken as "power to construe disputed or doubtful terms" within the meaning of *Firestone*. Because trustees may carry out their duty without language of this sort, its presence frequently signals the existence of discretion in implementation. [Citation omitted.] Perhaps, though, it describes *who* shall decide (the Plan Committee, as opposed to other parties involved in the establishment and implementation of this complex welfare benefits plan) rather than the *extent* of the committee's powers. Courts predictably have divided over the characterization of such ambiguous language. Compare *De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1186-87 (4th Cir. 1989), *Curtis v. Noel*, 877 F.2d 159, 161 (1st Cir. 1989), and *Lowry v. Bankers Life & Casualty Retirement Plan*, 871 F.2d 522, 524-25 (5th Cir. 1989), treating language similar to that in the SwedishAmerican Plan as granting discretion sufficient to require deferential review, with *Baxter v. Lynn*, 886 F.2d 182, 187-88 (8th Cir. 1989), and *International Brotherhood of Electrical Workers, Local 47 v. Southern California Edison Co.*, 880 F.2d 104, 108 (9th Cir. 1989), going the other way.

Id., at 1371, emphasis in original.

In later cases, the Seventh Circuit has sided with those courts holding that power to make "final and binding" decisions does not imply discretion to construe terms. *Ziaee v. Vest*, 916 F.2d 1204, 1207 (7th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 1581 (1991); *Petrilli v. Drechsel*, 910 F.2d 1441 (7th Cir. 1990). In *Petrilli*, the claims involved plan interpretations of whether there was a voluntary departure or "layoff" and the plan did not give express discretionary authority over such inter-

pretations. *Id.*, at 1447. The Seventh Circuit remanded the case for reconsideration because the district court failed to apply a de novo standard in reviewing the denial of claims for severance benefits. The *Bogue* decision directly conflicts with *Petrilli* because the administrator's determination of what constituted a "layoff" also required the exercise of a "judgmental function."

The Sixth Circuit has also required express language granting discretion. In *Brown v. Ampco-Pittsburgh Corp.*, 876 F.2d 546, 550 (6th Cir. 1989), the Sixth Circuit held that an eligibility provision requiring the employer to distinguish between "layoffs" and "terminations" did not impliedly confer discretion; "[a]bsent a clear grant of discretion to the administrator, application of the highly-deferential [standard] does not promote [ERISA's] goals." Similarly, the Sixth Circuit in *Johnson v. Eaton Corp.*, 970 F.2d 1569, 1571 (6th Cir. 1992) held "[t]his circuit has interpreted *Firestone* to require that the plan 'expressly' give discretionary authority to the administrator." These decisions are in clear conflict with *Bogue* which required no such express grant.

In *Pratt*, the Tenth Circuit also identified the conflict:

> [h]ere, an administrative committee is given power to construe and interpret the plan and that committee may seek guidance from others. *See supra* n.7. Courts have divided concerning whether similar generic language empowers a fiduciary with discretion "to construe disputed or dobutful terms," *see Bruch*, 489 U.S. at 111, 109 S.Ct. at 954, or merely serves to identify a particular fiduciary responsible for general plan interpretation. [Citations indicating split in circuits omitted.]

Pratt, at 920 F.2d 651, 658.

The administrator in *Pratt* was specifically given powers to construe and interpret, decide eligibility and "determine the right of any person to a benefit, in accord-

ance with the Plan . . ." *Id.*, at 657. The court held that this language vested the administrator with "not only the authority, but also the discretion, to decide questions of plan interpretation." *Id.*, at 658.

Contrary to *Pratt*, the Eighth and Fourth Circuits side with de novo review given this "generic language." *Baxter v. Lynn*, 886 F.2d 182, 187-88 (8th Cir. 1989); *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075, 1079 (4th Cir. 1989), *cert. denied*, 493 U.S. 919 (1989). In *Baxter*, the plan language provided "that the trustees have the final authority to determine all matters of eligibility for the payment of claims." The court held this clause "[m]erely describes the trustees' mandatory role in accepting or rejecting claims submitted to the Fund. It does not grant to the trustees the authority to construe ambiguous terms." *Id.*, at 188. *Dzinglski* held that a grant of final authority to determine eligibility standards under a disability benefits plan did not constitute discretionary authority to allow or deny benefits, but merely described the mandatory role to accept or reject claims. *Dzinglski*, at 1079.

Also requiring express language is the Fifth Circuit in *Cathey v. Dow Chemical Co. Medical Care Program*, 907 F.2d 554, 559 (5th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 964 (1991), and *Schultz v. Metropolitan Life Ins. Co.*, 872 F.2d 676, 678 (5th Cir. 1989). In *Schultz*, the court held de novo review applied because "[n]either party has pointed to any provision in the plan which gives the administrator discretionary authority to determine benefit eligibility or to construe the plan terms." *Id.*, at 678. In *Cathey*, the court held that absent an *express* grant of discretion over entitlement determinations, the deferential review operates adversely to "afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Id.*, at 559; *Wildbur v. Arco Chemical Co.*, 974 F.2d 631, 636 (5th Cir. 1992) ("[d]iscretionary authority cannot

be implied; an administrator has no discretion to determine eligibility or interpret the plan unless the plan language expressly confers such authority on the administrator.").

The Second Circuit also rejected the argument that discretionary authority can be implied. *Masella v. Blue Cross & Blue Shield, Inc.*, 936 F.2d 98, 103 (2nd Cir. 1991). Blue Cross argued that discretion was implicit because it was empowered to decide the scope of services that were offered and that the major medical expense plan is "subject to the terms and conditions of a basic medical surgical program which is acceptable to the Corporation, in its sole discretion." The court recognized the importance of preserving *Firestone*:

> [e]very employee benefit plan describes the scope of its coverage and describes the benefits it provides. If, as Blue Cross argues, discretionary authority to initially establish these terms and conditions of the plan were equivalent to an implicit grant of discretion to interpret the terms once they were established, then every benefit plan would be held to implicitly grant such discretion to the entity that established it. We cannot accept the conclusion that the discretion to establish the terms of a plan is the same as the discretion to interpret the terms later. Such reasoning would eliminate the *Firestone* distinction between plans that give an administrator or fiduciary discretionary authority to interpret them and those that do not.

Id., at 103.

The court further stated that a fiduciary has the ability to protect itself by including a provision granting it discretion. "[R]equiring that this discretion be provided for is consistent with ERISA's purposes of 'promot[ing] the interests of employees and their beneficiaries in employee benefit plans' and 'protec[ting] contractually defined benefits.'" *Id.*, at 103 (citing *Firestone*, 489 U.S. at 113).

The First Circuit has also adopted a rule in conflict with those circuits holding that discretion can be implied. *Allen v. Adage, Inc.*, 967 F.2d 695, 697 (1st Cir. 1992), holds "[e]xcept in those cases where a different level of scrutiny is indicated in the benefit plan itself, the district court considers a denial-of-benefits challenge afresh, without deferring to the employer's interpretation of the plan." Similar to the *Firestone* case, de novo review was required in *Allen* because nothing in the plan indicated otherwise and the phrase "reduction in force" was ambiguous. See, also, *Bellino v. Schlumberger Technologies, Inc.*, 944 F.2d 26, 29 (1st Cir. 1991) (because defendant "points to no language giving it 'discretionary authority,' " the court applied a de novo standard.)

Contrary to these cases requiring an express grant, the Third Circuit holds that discretionary powers may be implied by a plan's terms—even if not granted expressly. *Luby v. Teamsters Health, Welfare, and Pension Trust Funds*, 944 F.2d 1176, 1182 (3rd Cir. 1991). *Luby* involved a deceased employee's benefits file that contained two conflicting beneficiary designations. After stating the rule that "[d]iscretionary powers may be implied by a plan's terms even if not granted expressly," the court held that the specific plan at issue did not impliedly grant the administrator authority to make beneficiary determinations and his decision was thus subject to de novo review.

The District of Columbia Circuit rejected the argument that de novo review applied unless the word "discretion" appeared in the plan documents. *Block v. Pitney Bowes Inc.*, 952 F.2d 1450 (D.C. Cir. 1992.) The Pitney Bowes plan vested power to "interpret and construe the Plan, [and] to determine all questions of eligibility and the status and rights of Participants" as well as a provision that decisions will be "final and conclusive and binding . . ." *Id.*, at 1452-1453. The court held that these words implied discretion.

The Eleventh Circuit has found a grant of discretion on language nearly as scant as that involved in *Bogue*. In *Anderson v. Blue Cross/Blue Shield*, 907 F.2d 1072 (11th Cir. 1990), the court equated "[t]he ability to exercise such discretionary power" with a *grant* of discretionary authority. *Id.*, at 1076. Blue Cross merely had the right to determine which procedures were medically necessary and what amount would be paid to physicians as "reasonable and customary." As in *Bogue*, there was no language *granting* discretion.

The conflict in the circuits can be summarized as follows. Those circuits holding that discretionary authority can be implied by generic language of the administrator's decision-making powers include the Third Circuit in *Luby*, the Ninth Circuit in *Bogue*, the Tenth Circuit in *Pratt*, the Eleventh Circuit in *Anderson* and the District of Columbia Circuit in *Block*. Those circuits holding that discretionary authority can only be found if there is clear or express language of discretion in the plan documents include the First Circuit in *Allen* and *Bellino*, the Second Circuit in *Masella*, the Fourth Circuit in *Dzinglski*, the Fifth Circuit in *Wildbur*, *Schultz* and *Cathey*, the Sixth Circuit in *Brown* and *Johnson*, the Seventh Circuit in *Ziaee* and *Petrilli*, and the Eighth Circuit in *Baxter*. The frequency with which this issue arises in the lower courts and the conflicting decisions of the circuits demonstrates the need for resolution of the issue by this Court.

C. The Rule Established by the Ninth Circuit in *Bogue*.

The Ninth Circuit in *Bogue* has gone further than any circuit by inferring discretionary language merely because the administrator had to use judgment in deciding claims. A judgmental function in analyzing claims or interpreting the plan document should not connote a grant of discretion to decide the issue under *Firestone*. Such a rule vitiates the meaning of *Firestone* because it limits de novo review to only those cases where

a mathematical or self-defining analysis of the claim is required. In those situations the plan is self-executing; the administrator's function is limited to claim computation without *any* judgmental analysis. Under the holding in *Bogue*, the possibility of de novo review becomes virtually non-existent because mathematical and self-defining analyses generate little controversy.[6]

A recent New York district court case specifically rejected the rationale of *Bogue* when *Bogue* was at the district court level.[7] On remarkably similar facts, Judge Mukasey of the Southern District of New York declined to follow the *Bogue* decision in *Clark v. Bank of New York*, 801 F.Supp. 1182 (S.D.N.Y. 1992). *Clark* involved an employee who was entitled to severance pay after a corporate acquisition *if* the employee's responsibilities were "materially diminished" within two years of a change in corporate control. This is directly comparable to Bogue's entitlement to severance pay in the event the new owners of Ampex failed to offer him "substantially equivalent employment."

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[6] A judgmental analysis was present under the facts of *Firestone*. Under the ERISA plan, Firestone provided termination pay to employees in the event of a "reduction in force." Firestone made a judgmental determination that the transfer of employees to the acquiring company did not constitute a "reduction in force" within the meaning of the plan. Yet, despite responsibility to exercise judgment, this Court held the Firestone plan did *not* confer discretionary authority and de novo review applied. The *Bogue* court also found the fact that Allied-Signal was ultimately responsible for the payment of a claim significant to a finding of discretionary authority. *Bogue*, at 1324, fn. 25. This fact was also present in *Firestone*, yet this Court held the plan did not confer discretionary authority. If responsibility for funding a plan is equated with discretionary authority, then rarely will ERISA severance claims be reviewed de novo because severance plans are typically funded by the employer.

[7] As stated earlier, the Ninth Circuit adopted verbatim the language and reasoning of the district court in *Bogue* on the issue of standard of review. *Bogue* at 1325.

The employer in *Clark* argued that the term "responsibilities materially diminished" was language indicating a grant of discretion. *Id.*, at 1189-1190. After acknowledging the phrase "materially diminished" is not self-explanatory, Judge Mukasey found its ambiguity insufficient to support a finding that the plan vested the administrator with discretion. Judge Mukasey identified the flaw in the employer's argument as follows:

> [V]irtually no standard of conduct that is not based on mathematical computation can be completely self-defining. As a result, if the mere inclusion in a benefits plan of a term such as "material" were enough to confer discretion on the plan administrator, all but the most mechanical decisions by plan administrators would be protected by the abuse-of-discretion or arbitrary-and-capricious review standard. *That would turn on its head what is supposed to be the usual rule—namely, that the de novo standard is the default standard of review and that the plan administrator appears to bear the burden of proving that "it does wield discretionary authority over benefits decisions."*

Id., at 1189, emphasis added. (Citing *Arthurs v. Metropolitan Life Ins. Co.*, 760 F.Supp. 1095, 1098 (S.D.N.Y. 1991).)

Firestone should not be read to deny de novo review to all claims requiring judgmental analysis. Judge Mukasey recognized that this would be the effect if judgmental claim analysis was equated with a grant of discretionary authority. After a complete and accurate analysis of the issues raised in *Bogue* at the district level, Judge Mukasey declined to follow *Bogue* "because the Allied-Signal plan did not explicitly grant discretionary authority to the plan administrator." *Id.*, at 1190. After concluding the crucial issue in *Bogue* was whether or not the two jobs had responsibilities "similar," Judge Mukasey stated:

> [t]he *Bogue* plan did no more than include one term —"similar"—that was not self-defining. Because I find that a plan's mere inclusion of such a term is insufficient by itself to vest the plan administrator with discretion, and thereby overcome the presumption of *de novo* review under *Firestone*, I decline to follow *Bogue*.

Id., at 1190.

D. *Bogue* Should not Stand as the Law of the Ninth Circuit.

The clear message of *Firestone* was to establish de novo review at a time when "arbitrary and capricious" was the rule in all circuits. See, e.g., *Anderson*, *supra*, 942 F.2d at 394-95. The circuits disagree over what language is necessary to avoid de novo review. This Court recognized, in *Firestone*, that ERISA was enacted "to promote the interests of employees and their beneficiaries in employee benefit plans" and "to protect contractually defined benefits." The question presented is of great importance to the millions of employees covered by ERISA plans. For them to be denied judicial review, except on an abuse-of-discretion basis, where the administrator simply exercises a judgmental function—and with no stated grant of discretionary authority—is contrary to *Firestone* and the fundamental purposes of ERISA. H.R. Rep. No. 93-533, p. 11 (1973) U.S. Code Cong. and Admin. News 1978, p. 4649 (Congress' purpose in enacting the ERISA disclosure provisions includes ensuring that "the individual participant knows exactly where he stands with respect to the plan.")

Bogue should not stand as the law of the Ninth Circuit on this important issue. This Court should grant certiorari to settle the conflict in the circuits over what language is necessary for a grant of discretion sufficient to overcome *Firestone's* default standard—that the

ERISA plan administrator's denial of benefits will be subject to de novo review.[8]

CONCLUSION

This petition provides an opportunity for this Court to resolve several outstanding and fundamental issues that often arise in ERISA litigation. The question of ERISA preemption is of major importance and this case can provide needed clarification on where to draw the line between ERISA and non-ERISA employee benefit "plans." If the Allied-Signal Special Compensation Program is an ERISA employee benefit plan, this case can also serve to establish the criteria necessary for a grant of discretionary authority to decide claims or construe the terms of a plan. For all of the above reasons, this petition should be granted.

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[8] A conflict in the circuits has also developed concerning the standard of review to be applied when a benefits decision turns on the facts of the case, rather than interpretation of the terms in the ERISA plan. *Pierre v. Connecticut General Life Ins. Co.*, —— U..S. ——, 112 S.Ct. 453 (1991) (Justices White and Blackmun dissenting from the denial of certiorari). The Fifth and Eighth Circuits have adopted the deferential standard of review to judicial review of an administrator's factual determinations. *Pierre, supra*, 932 F.2d 1552, 1562; *Oldenburger v. Central States Southeast & Southwest Areas etc.*, 934 F.2d 171, 173 (8th Cir. 1991). The Third, Fourth and Seventh Circuits are on the side of de novo review. *Luby v. Teamsters*, 944 F.2d 1176 (3rd Cir. 1991); *Reinking v. Philadelphia American Life Ins. Co.*, 910 F.2d 1210 (4th Cir. 1990); *Petrilli v. Drechsel*, 910 F.2d 1441 (7th Cir. 1990). Although Bogue's claim turns on the factual determination of "responsibilities similar," this issue was not decided by the district court because it limited its review to the question of whether Allied-Signal abused its discretion in denying Bogue's claim.

Respectfully submitted,

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Dated: February 19, 1993

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-15038

D.C. CV-89-0682-CAL

DONALD F. BOGUE,
Plaintiff/Appellant,

v.

AMPEX CORPORATION and ALLIED-SIGNAL, INC.;
DOES 1-10, INCLUSIVE,
Defendants/Appellees.

Appeal from the United States District Court
for the Northern District of California
Charles A. Legge, District Judge, Presiding

Argued and Submitted
March 12, 1992—San Francisco, California

Filed October 7, 1992
Amended December 2, 1992

Before: John Minor Wisdom,* Robert R. Beezer, and
Stephen S. Trott, Circuit Judges.

Opinion by Judge Wisdom

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* The Honorable John Minor Wisdom, United States Circuit Judge for the Fifth Circuit, sitting by designation.

ORDER AND AMENDED OPINION

WISDOM, Circuit Judge:

The plaintiff/appellant, Donald Bogue, seeks severance payments denied him by his former employer. The district court upheld that denial under the Employee Retirement Income Security Act ("ERISA").[1] We find that ERISA controls this case, supports the denial of benefits, and offers Bogue no other opportunity to challenge the decisions below. We AFFIRM, but decline to award attorney fees to the appellees.

I. *BACKGROUND*

Donald Bogue was a Vice President of the Audio-Video Systems Division of Ampex Corporation, a Redwood City manufacturer of sound equipment. Allied-Signal owned Ampex between September 1976 and May 1987. During November 1986 Allied-Signal informed ten executives of Ampex (including Bogue) that it intended to sell Ampex. To retain those executives, at least temporarily, Allied-Signal established the "Allied-Signal/E & I Sector Special Compensation Program for Designated Key Executives".[2] The program provided for severance benefits if

> neither Allied-Signal nor the Buyer [of Ampex] offers you "substantially equivalent" employment and your employment is terminated.

"[S]ubstantially equivalent employment" was defined as a job that included "responsibilities similar" to those while Allied-Signal still owned Ampex. Allied-Signal

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[1] 29 U.S.C. § 1001, *et seq.*

[2] Mindful of ERISA's language, Allied-Signal carefully refers to this program as the "Plan". Bogue is similarly careful to call it the "Program". We prefer "program" because that is the word used in November 1986 letters by Allied-Signal in describing to key executives its "Special Compensation Program for Designated Key Executives",

would determine whether the benefits were appropriate in each case. The program would end on March 31, 1988.[3]

Allied-Signal sold Ampex in May 1987. Ampex (through its new owner) assumed liability for paying severance benefits under the program. The new president of Ampex reorganized the business and offered Bogue a position as Vice President of Marketing, Sales & Service. He accepted the offer in the hope that it would help his career; he told Ampex, however, that he considered the position one that was not "substantially equivalent" to his old job. Citing the same complaint and seeking severance pay under the program, he resigned from Ampex in January 1988. Allied-Signal, which had obligated itself to administer the program after the sale of Ampex, denied Bogue's request for severance pay. It based that decision on Ampex's argument that Bogue's new position *was* substantially equivalent to his previous job.

Bogue later filed a lawsuit against Ampex and Allied-Signal in state court. The defendants successfully removed the case to federal court based on ERISA preemption; the district court denied Bogue's request for remand to state court, and later granted summary judgment in favor of Allied-Signal and Ampex. The district court concluded that Allied-Signal's denial did not abuse its fiduciary discretion, that no conflict of interest existed between Allied-Signal and Ampex that would require the court to apply a more stringent standard of review, and that Bogue had not made out a violation of 29 U.S.C. § 1140, which prevents an employer from intentional discrimination in depriving its employees of plan benefits.[4] Bogue appeals these decisions. The defendants "intend to seek attorney fees for the appeal"; we read that intent as a request for those fees.

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[3] The program also provided for a "Stay Bonus" and a "Sale Price Incentive", neither of which are at issue here.

[4] The court made other conclusions irrelevant to this appeal.

II. *DISCUSSION*

A. ERISA Preemption

ERISA preemption [5] provides for the removal to federal court of lawsuits involving employee benefit plans. Because ERISA preemption is the sole basis of federal jurisdiction in this case we must decide whether the "Special Compensation Program for Designated Key Executives" is an "employee benefit plan" under ERISA.

ERISA preemption is notoriously broad, but several recent cases have held that it has reasonable limits. In the leading case on this question the Supreme Court held that ERISA did not preempt a state plant-closure law that provided for a lump sum severance payment, triggered by a single event that may never occur.[6] In *Fort Halifax* the Court found that such a law "simply creates no need for an ongoing administrative program for processing claims and paying benefits".[7] Bogue contends that the Allied-Signal severance payment program should be similarly exempt from ERISA preemption. It had a very short term (17 months); it applied only contingently, *if* Ampex were sold, *and* if the employee were denied substantially equivalent work by the buyer; and it would apply only once to any individual employee. Allied-Signal contends that the program, by its own terms, required the sort of discretionary decision-making by the plan's administrator that is the hallmark of an ERISA plan. We agree with Allied-Signal. The program before us involved more than what *Fort Halifax* describes as "[t]he theoretical possibility of a one-time obligation in the future".[8]

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[5] ERISA provides that it "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan". 29 U.S.C. § 1144(a).

[6] *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987).

[7] *Id.* at 12.

[8] *Id.*

Bogue finds support in the Fifth Circuit's post-*Fort Halifax* opinion in *Wells v. General Motors Corp.*[9] *Wells* held that the General Motors "procedure by which employees could elect to receive a one-time lump payment if they ceased working at the plant" [10] was not an ERISA plan. The Court found that

> [t]he plan was not ongoing, nor was there any need for continuing administration of the payment program . . . . The facts that GM made the payments pursuant to a Voluntary Termination of Employment "*Plan*" and that the employees received a benefit do not convert the plan into an "employee benefit plan" for purposes of ERISA.[11]

This language might suggest that the Allied-Signal program, because of its limited time frame, its contingency, and its one-time application to any affected employee, was not an ERISA plan. Considering Allied-Signal's concession that even it was unaware that the program might be subject to ERISA, Bogue's argument is not without merit. In finding that the program is susceptible to ERISA preemption, however, we choose to follow the approach of the Third Circuit in considering a severance plan similar to the program in this case, and a more recent Fifth Circuit case that narrows the broader implications of *Wells*.

In *Pane v. RCA Corp.*,[12] the Third Circuit held that a corporation severance agreement, instituted to keep key employees at work during the possibly lengthy consummation of a corporate merger, was an ERISA plan. The court stated simply, without further elaboration, that

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[9] 881 F.2d 166 (5th Cir.), *reh'g en banc denied*, 887 F.2d 1083 (5th Cir. 1989), *cert. denied*, 495 U.S. 923 (1990).

[10] *Id.* at 176.

[11] *Id.*

[12] 868 F.2d 631 (3d Cir. 1989).

the severance agreement "required an administrative scheme".[13]

The reasoning of a recent Fifth Circuit case, *Fontenot v. NL Indus., Inc.*,[14] fleshes out the logic behind *Pane* accurately describing the fence between cases involving real ERISA plans and cases such as *Fort Halifax*. *Fontenot* looks to whether the plan in question " 'require[s] an administrative scheme' because 'the circumstances of each employee's termination [have to be] analyzed in light of [certain] criteria' ".[15] We adopt this approach, which places the Allied-Signal program on the ERISA side of that fence.

In this case, Allied-Signal, the program's administrator, remained obligated to decide whether a complaining employee's job was "substantially equivalent" to his pre-acquisition job. Although the program, like the plans in *Fort Halifax* and *Wells*, was triggered by a single event, that event would occur more than once, at a different time for each employee. There was no way to carry out that obligation with the unthinking, one-time, nondiscretionary application of the plan administrators in *Fort Halifax* and *Wells*. Although its application was uncertain, its term was short, and the number of its participants was small, the program's administration required a case-by-case, discretionary application of its terms. Whether or not Allied-Signal ever thought it would have to administer an ERISA plan does not matter; there was no way to administer the program without an administrative scheme. We hold that Allied-Signal was obligated to apply enough ongoing, particularized, administrative, discretionary analysis to make the program in this case a "plan".

Bogue contends that, even if the program is a "plan", it should not apply to him because he is not an employee

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[13] *Id.* at 635.

[14] 953 F.2d 960 (5th Cir. 1992).

[15] *Id.* at 962-63 (quoting *Pane v. RCA Corp.*, 667 F. Supp. 168, 170-71 (D.N.J. 1987)).

of the plan's administrator, Allied-Signal.[16] The appellees contend that, because Ampex assumed liability for a program established and administered by Ampex, the program *is* maintained by Bogue's employer.

Bogue cites cases holding that controlling shareholders cannot be personally liable for damages under a plan maintained by the corporation they control; he contends that a shareholder, like Allied-Signal, can never be an "employer" under ERISA.[17] The appellees note that ERISA defines the term "employer" broadly.[18] They argue that a benefit program established by a parent corporation for the employees of its wholly owned subsidiary should not be removed from ERISA's coverage simply because their corporate structure might seem to divide the two companies. We agree. When a corporation establishes an employee benefit plan for the employees of its wholly owned subsidiary and retains the duty to administer that plan, and when the subsidiary bears the financial burden of funding it, the plan is "established or maintained by an employer" and is accordingly controlled by ERISA.

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[16] 29 U.S.C. § 1002(1) defines an employee benefit plan as one "established or maintained by an employer".

[17] Without discussing the issue, two Second Circuit cases have applied ERISA to benefits established by parent corporations for employees of subsidiaries. *See Reichelt v. Emhart Corp.*, 921 F.2d 425, 427-28 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2854 (1991); *Accardi v. Control Data Corp.*, 836 F.2d 126, 127-28 (2d Cir. 1987).

[18] Allied-Signal also argues that it was Bogue's employer under ERISA when it established the program because it was acting in the interest of his employer, Ampex. 29 U.S.C. § 1002(5) provides that "[t]he term 'employer' means any person acting directly as an employer, *or indirectly in the interest fo an employer*, in relation to an employee benefit plan . . ." (emphasis added). Allied-Signal established the program in order to make Ampex more attractive to a potential buyer. Although this goal involved a level of self-interest to Allied-Signal, it cannot be said that it was *not* done in the interest of Ampex.

B. Standard of Review

After deciding that the program's administrative discretion entails ERISA preemption, a related question follows: Does a federal court review Allied-Signal's decision that Bogue was not entitled to severance pay *de novo* or only for an abuse of discretion? [19]

Bogue argues that the district court incorrectly applied an abuse of discretion standard in this case. The standard by which we review benefit decisions depends on the amount of discretion that the plan vests in its administrator. The Supreme Court has held that

> a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.[20]

The Allied-Signal program provides for severance payments if the buyer of Ampex does not provide the employee with "substantially equivalent employment":

> The determination of "Substantially equivalent" position will be made by Allied-Signal upon consideration of whether the new position:
>
> (i) has compensation and benefits with a value not less than 90% of your current compensation and benefits . . . ;
>
> (ii) is located not more than 50 miles from your current work location; and

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[19] We review the district court's summary judgment *de novo*, of course. *Kruso v. Int'l Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 496 U.S. 937 (1990). The question here is what standard of review should be applied by any federal court in reviewing the plan administrator's decisions.

[20] *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).

(iii) has responsibilities similar to those of your current position.[21]

The full extent of the program's discretion, therefore, lies in the phrase "[t]he *determination . . . will be made by Allied-Signal* upon consideration of whether the new position . . . has responsibilities *similar to those of your current position*".[22]

The language of the plan in this case is virtually indistinguishable from language recently interpreted by this Court. In *Eley v. Boeing Co.*,[23] we considered a health plan whose administrator "shall determine the eligibility of a person for benefits under the plan" and stated that the administrator "retains final authority and responsibility for the Plan and its operation."[24] As in *Eley*, the program stated that Aliled-Signal would make the determination of eligibility for benefits, and the program clearly placed on Allied-Signal the ultimate responsibility for funding those benefits.[25] We find that the program imposes on Allied-Signal, "the administrator [,] . . . discretionary authority to determine eligibility for benefits or to construe the terms of the plan".[26]

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[21] Allied-Signal/E&I Sector Special Compensation Program for Designated Key Executives: *Severance Pay* 1-2.

[22] *Id.* (emphasis added). Obviously, the determinations of salary level and geographical location confer no discretion on the administrator. Only the meaning and effect of "substantially equivalent" and "responsibilities similar" are at issue.

[23] 945 F.2d 276 (9th Cir. 1991).

[24] *Id.* at 278 n.2.

[25] It provided that "Allied-Signal will make up the difference between the buyer's severance pay program and" 18 months' pay. Bogue concedes that, in spite of Ampex's assumption of liability for the program, Allied-Signal remained ultimately liable in case Ampex defaulted. There is no question that the program placed on Allied-Signal (as it placed on the administrator in *Eley*) the "final authority and responsibility" for its operation.

[26] *Bruch*, 489 U.S. at 115; *see Eley*, 945 F.2d at 278.

Language that establishes only an entity's right to administer or manage a plan does not confer discretion.[27] Nevertheless, we agree with the district court that the language in the Allied-Signal program

> does more than simply designate that Allied-Signal will be the administrator of the plan. It grants Allied-Signal the authority to evaluate and determine facts, including whether an employee's prior and prospective position are "similar". This evaluation necessarily invokes a judgmental function in analyzing the positions. Under *Firestone*, this is sufficient evidence of a grant of discretionary authority.[28]

We do not want to encourage an employer to insulate himself from effective appellate review through the abuse of vague phrases that fail to make clear to the employees that the employer will have the final determination of benefit decisions. Employees who lose promised benefits should not lose the additional benefit of judicial review because their employer reserved discretionary power to itself without making that reservation clear. But when a plan includes even one element is unambiguously retained by its administrator, we may not second-guess the exercise of that discretion. The program's beneficiaries were on notice that Allied-Signal had such discretion over determining whether their responsibilities were substantially reduced; we can reverse the exercise of such discretion only when it has been abused.

C. Conflict of Interest

Before arguing that Allied-Signal *did* abuse its discretion, Bogue asks us to impose a more stringent *version* of the abuse of discretion standard because a conflict of

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[27] *Bruch*, 489 U.S. at 111; *Orozco v. United Air Lines, Inc.*, 887 F.2d 949, 952 (9th Cir. 1989; *International Bhd. of Elec. Workers Local 47 v. Southern Cal. Edison Co.*, 880 F.2d 104, 108 (9th Cir. 1989).

[28] *Bogue v. Ampes Corp.*, 750 F. Supp. 424, 428 (N.D. Cal. 1990).

interest existed between the administrator and the beneficiary. This Court has confirmed that less deference applies when the administrator's decision involves a "serious conflict" between the administrator and the employee.[29] *Bruch* itself directs the courts to take into consideration any conflict of interest in looking for an abuse of discretion.[30]

Bogue contends that such a conflict existed between him and both Ampex (which would have had to fund his severance pay) and Allied-Signal. The district court in this case found no such conflict because Ampex did not make the benefit decision, and because Allied-Signal's decision had no effect on its own finances.[31]

We disagree with the district court, but we affirm its result even under the less deferential standard of review. We find that there were, in fact, two conflicts of interest in this case. First, there was the risk that Ampex might not reimburse Allied-Signal for any severance pay that the latter awarded to Bogue from an unfunded plan. As we noted above, Allied-Signal's indemnification agreement with Ampex did not relieve it of its primary responsibility to Bogue and his fellow employees. Second, and more important, there was Allied-Signal's dependence on Ampex for information about the similarity between Bogue's old and new responsibilities. It was obviously in the financial interest of Ampex to recommend against an award of severance pay that it would have to fund.

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[29] *Oster v. Barco of Cal. Employees' Retirement Plan*, 869 F.2d 1215, 1217 (9th Cir. 1988). Because the great deference accorded a plan administrator arises in part from the assumption of trust law that the trustee has no pecuniary interest in his decisions, proof that the trustee *does* have such interest correspondingly strengthens the court's level of review.

[30] 489 U.S. at 115.

[31] *Bogue*, 750 F. Supp. at 429-30.

We disagree with Bogue's argument that these conflicts of interest poisoned Allied-Signal's decision about the similarity of his old and new jobs. Bogue quotes a letter from Ampex advising Allied-Signal to deny Bogue's claim for severance pay. He finds in that letter conclusive evidence that a conflict of interest in both Ampex and Allied-Signal caused the denial of his claim. Allied-Signal did, apparently, rely on Ampex's characterization of Bogue's new job. Ampex, in turn, had a strong incentive (its wallet) not to recommend severance pay for Bogue. Nevertheless, in reviewing the record we find that Allied-Signal's decision to deny severance pay to Bogue not only satisfies the less deferential abuse of discretion standard of review; its decision was fully consistent with the plain language of the program.

D. Did Allied-Signal Abuse its Discretion?

The difference between Bogue's pre-acquisition and post-reorganization jobs at Ampex are in some practical respects great, but they involve very comparable levels of responsibility within the corporation. Allied-Signal did not abuse its discretion in finding the two jobs substantially equivalent. The district court's findings of fact say it all:

> Plaintiff's original position was Vice President and General Manager of the Audio-Video Systems Division. After the reorganization, Ampex offered plaintiff the position of Vice President, Marketing, Sales and Service. The undisputed evidence shows that under both positions plaintiff was (1) a vice president, reporting directly to the chief executive officer; (2) a member of the Executive Management Committee; (3) responsible for directing a discrete section of the company, including responsibility for its personnel (*e.g.* selection, compensation, benefits, training and terminations), finances, facilities, informa-

> tion systems, and implementation of corporate policies;[sic] and (4) responsible for directing sales, sales analysis, accounts receivable, servicing, and marketing services. Plaintiff's new position also continued his career path as a potential candidate for chief executive officer of Ampex. And compared to his position before the sale, plaintiff's annual salary increased from $125,000 to $150,000, and his bonus potential from $70,000 to $150,000.[32]

The district court concluded that Allied-Signal did not abuse its administrative discretion in denying Bogue severance payments. Although we apply a somewhat stricter standard of review to account for conflicts of interest between Ampex and Allied-Signal, we reach the same conclusion.

Because the district court's conclusion is irrefutable, Bogue appends a due process argument under ERISA; he contends that Allied-Signal failed to comply with ERISA's reporting and disclosure requirement. The defendants concede that Allied-Signal may have made procedural violations, but they contend that Bogue has not met his requirement of showing that any procedural defects caused him substantive harm or involved a substantive violation of ERISA.[33] They are correct.

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[32] *Id.* at 429.

[33] In *Hancock v. Montgomery Ward Long Term Disability Trust*, 787 F.2d 1302, 1308 (9th Cir. 1986) (citations omitted), *disapproved on other grounds, Bruch*, 489 U.S. 101, this Court wrote:

> Substantive remedies are available for procedural defects under ERISA only when the defects "caused a substantive violation or themselves worked a substantive harm."

In *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985), a case relied on by Bogue, this Court noted that

> [o]rdinarily, a claimant who suffers because of a fiduciary's failure to comply with ERISA's procedural requirements is entitled to no substantive remedy.

E. Anti-Discrimination Under ERISA

Bogue seeks alternative relief under ERISA's antidiscrimination provision;[34] he alleges that Ampex violated that law by urging Allied-Signal to deny his claim for severance pay. He would find proof of discrimination against him in Ampex's admission that it provided severance pay to several executives who resigned after the program had ended. The district court held that 29 U.S.C. § 1140 does not apply unless the employee is actively or constructively discharged. Bogue notes that the language of § 1140 is not so limited. This Court has considered his argument, however, and refuted it.[35] Bogue offers no evidence that he was discharged.

The district court correctly found that Bogue had voluntarily resigned. His allegations of payments made to other executives are irrelevant because § 1140 prevents discrimination only "under the provisions of an employee benefit plan". It therefore does not apply to payments made voluntarily by Ampex after the program had terminated. The court also found, correctly, that Ampex's letter of recommendation to Allied-Signal was nothing more than a "matter-of-fact description of the relationship between Ampex and plaintiff after Ampex's reorganization". Bogue's only legal support for his discrimination charge

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[34] 29 U.S.C. 1140 provides:

> It shall be unlawful for any person to . . . discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . .

[35] *See Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 881 (9th Cir. 1989) ("[T]o establish a violation under § 1140, a plaintiff-employee must show that his [exercise of rights under the benefit plan] was the motivating force behind his discharge."), *cert. denied*, 111 S.Ct. 53 (1990); *Lojek v. Thomas*, 716 F.2d 675, 680-81 (9th Cir. 1983); *see also Kuntz v. Reese*, 760 F.2d 926, 933 (9th Cir. 1985) ("[§ 1140] does not apply in cases, such as the one before us, in which the employees are not discharged."), *withdrawn on other grounds*, 785 F.2d 1410 (9th Cir.), *cert. denied*, 479 U.S. 916 (1986).

is the letter Ampex sent Allied-Signal. That charge was properly dismissed.

F. Attorney Fees

ERISA allows us to award attorney fees to either party for costs incurred in bringing an appeal.[36] Although Bogue does not prevail here, we find that his appeal was not brought in bad faith; that the defendants are as able as he to bear the cost of their attorney fees; that an award of fees against him would not discourage others from raising appeals more frivolous than his; and that the parties' positions were relatively equal in merit.[37] For those reasons we refuse to charge him with the defendants' attorney fees for this appeal.

III. CONCLUSION

For the reasons stated above, we AFFIRM the district court's order granting summary judgment in favor of the defendants. The defendants' request that we impose on Bogue their attorney fees for this appeal is DENIED.

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[36] *See* 29 U.S.C. § 1132(g)(1).

[37] This Court has outlined five factors to be measured in deciding whether to award attorney fees to a prevailing party in an ERISA case. Those factors are:

> (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions.

Hummell v. S. E. Rykoff & Co., 634 F.2d 446, 453 (9th Cir. 1980). We have relied on factors one, two, three, and five in reaching our conclusion. Factor four seems inapplicable here. Although it weighs against Bogue in that he seeks a benefit only for himself, the factor seems to apply only when a prevailing *plaintiff* seeks attorney fees; ERISA's provision for such an award recognizes that a case brought by such a plaintiff often benefits a large group of others in similar situations.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-89-0682 CAL

DONALD F. BOGUE,

Plaintiff,

v.

AMPEX CORPORATION, and ALLIED-SIGNAL, INC.,

Defendants.

OPINION AND ORDER GRANTING SUMMARY JUDGMENT

[Filed October 26, 1990]

Plaintiff Donald Bogue brings this action under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.*, claiming that defendants wrongfully denied him severance benefits, breached their fiduciary duties, and interfered with his protected rights. Defendants have moved for summary judgment on all claims alleged against them in the first amended complaint. Having considered the record, the relevant authorities, the moving and opposing papers, and the arguments of counsel, the court concludes that there is no genuine issue of material fact and that summary judgment should be granted in favor of defendants.

I.

The following facts are undisputed: Plaintiff seeks severance benefits under the terms of the "Allied-Signal/E&I Sector Special Compensation Program for Designated Key

Executives." This program was established by Allied-Signal in November 1986 in conjunction with its proposed sale of Ampex Corporation, a wholly owned subsidiary. Plaintiff was an employee of Ampex. The program included severance benefits if:

> Neither Allied-Signal nor the Buyer [of Ampex] offers you "substantially equivalent" employment and your employment is terminated.

Allied-Signal sold Ampex to Newhill Acquisition Corporation in May 1987. Pursuant to that sale agreement, Ampex assumed the financial obligations for the severance portion of the program, and Allied-Signal remained the plan's administrator.

Ampex was reorganized in November 1987. Prior to the reorganization, plaintiff held the position of Vice President and General Manager of the Audio-Video Systems Division of Ampex. After the reorganization, Ampex offered plaintiff the position of Vice President of Marketing, Sales & Service. Plaintiff accepted the new position. However, he expressed reservations about whether the new position was substantially equivalent to his prior position. Plaintiff resigned his new position in January 1988, because he then believed that the position "consists of significantly diminished responsibility." He made a claim to Allied-Signal for the severance benefits under the program. In March 1988, Allied-Signal denied his claim, finding that plaintiff's new position was substantially equivalent to his former position. Plaintiff's claim was reconsidered by Allied-Signal, and was again denied.

II.

Plaintiff then filed this action in state court. Defendants removed the case to this court on the ground that plaintiff's severance claims are governed by ERISA, and are therefore within the original jurisdiction of this federal district court. On plaintiff's motion to remand, this court ruled that the severance plan was governed by

ERISA and that removal was proper. The court also dismissed the complaint, with leave to amend to replead the claims under the standards of ERISA. Plaintiff then filed the present amended complaint, and this summary judgment motion followed.

The amended complaint contains four claims: the first is for $512,300, plus interest, in severance benefits and for attorneys fees; the second alleges that Ampex is estopped from denying severance benefits to plaintiff; the third alleges that Ampex interfered with plaintiff's protected benefit rights in violation of 29 U.S.C. § 1140; the fourth alleges breach of fiduciary duties in violation of 29 U.S.C. § 1109.

III.

Plaintiff's first claim, for the recovery of benefits under the plan, is based on 29 U.S.C. § 1132(a)(1)(B) (1985).[1] This section creates a cause of action for the recovery of benefits "due to him under the terms of his plan." The resolution of plaintiff's claim therefore turns on an interpretation of the plan provisions which define the severance benefits.

A.

The first and critical question is the standard for this court's review of Allied-Signal's decision to deny the severance benefits to plaintiff. Plaintiff contends that he is entitled to *de novo* review of Allied-Signal's decision. Defendants maintain that Allied-Signal's decision can be reviewed only for an abuse of discretion. Both parties agree that the U.S. Supreme Court's decision in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989) is controlling.[2]

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[1] All subsequent statutory references are to Title 29.

[2] The Ninth Circuit upheld retroactive application of *Firestone* in *Orozco v. United Air Lines, Inc.*, 887 F.2d 949 (9th Cir. 1989).

ERISA does not itself specify the standard for a district court's review in actions under § 1132(a)(1)(B) challenging the determinations of benefit eligibility by a plan administrator. *Firestone*, 489 U.S. at 109. To fill this gap, the Supreme Court adopted a standard of review from the principles of trust law. *Id.* at 954. Those trust principles require a deferential standard of review when a trustee exercises powers that are discretionary. *Id.* Accordingly, the *Firestone* court said:

> [A] denial of benefits under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.

Id. at 115.

Therefore, the question becomes whether this plan vests in Allied-Signal the discretion either to settle disputed eligibility questions or to construe doubtful provisions of the plan. *De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1186 (4th Cir. 1989); *Kunin v. Benefit Trust Life Ins. Co.*, 898 F.2d 1421, 1424 (9th Cir. 1990), *amd.*, *reh'g denied*, 910 F.2d 534 (9th Cir. 1990). This court is required to construe the plan in light of its language, "all the circumstances," and other manifestations of the parties' intent. *Firestone*, 489 U.S. at 112-113. If Allied-Signal is entitled to exercise discretion under the plan, its decision to deny plaintiff's benefits may be distributed only upon a showing of a procedural or a substantive abuse of that discretion. *Johnson v. Trustees of W. Conf. of Teamsters Pension Trust Fund*, 879 F.2d 651, 654 (9th Cir. 1989); *Firestone*, 489 U.S. at 111.

B.

Defendants contend that the plan gives Allied-Signal discretionary authority both to determine eligibility for benefits and to construe the plan's terms. Plaintiff responds that the plan only designates the entity that is to

determine employee claims and that, under *Firestone*, this is insufficient to confer discretion on the administrator.

The language of the plan provides for the payment of severance benefits if the buyer of Ampex does not offer plaintiff:

> [A] position that is substantially equivalent to your current position. This determination will be made by Allied-Signal upon consideration of whether the new position:
>
> (i) has compensation and benefits with a value not less than 90% of your current compensation and benefits . . .;
>
> (ii) is located not more than 50 miles from your current work location; and
>
> (iii) has responsibilities similar to those of your current position.

Conditions (i) and (ii) are undisputed by plaintiff. At the time of the sale of Ampex, plaintiff's salary was $125,000, with a bonus potential of $70,000. After the reorganization, plaintiff's new position had a salary of $150,000, with a bonus potential of $150,000. Both jobs were located at Ampex's Redwood City headquarters. The dispute is whether discretion is conferred upon Allied-Signal to determine if the positions have similar responsibilities; condition (iii).

Plaintiff is correct that language which only establishes an entity's right to administer or manage a plan does not confer discretion. *Firestone*, 489 U.S. at 111. *Orozco v. United Air Lines, Inc.*, 887 F.2d 949, 952 (9th Cir. 1989); *International Brotherhood of Electrical Workers Local 47 v. Southern California Edison*, 880 F.2d 104, 108 (9th Cir. 1989). However, language in a plan which grants authority to the administrator to determine questions of eligibility and coverage is sufficient to demonstrate discretionary authority. *See e.g., Lakey v. Reming-*

ton Arms Co., 874 F.2d 541, 544 (8th Cir. 1989) (severance pay plan permitted administrator 'to interpret the more usual situations that may arise in the application of the principles of the [severance pay] policy'); *Richards v. United Mine Workers' Health & Retirement Fund*, 895 F.2d 133, 135 (4th Cir. 1990) (independent trustees have the power of 'full and final determination as to all issues concerning eligibility for benefits.'). The Eleventh Circuit, in *Newell v. Prudential Ins. Co.*, 904 F.2d 644 (11th Cir. 1990), upheld the application of the abuse of discretion standard to a group medical, health and accident policy:

> The district court correctly concluded that because the Prudential plan . . . gives Prudential some degree of discretion in determining whether charges would be deemed necessary and eligible, *Firestone* would sanction the continued application of the arbitrary and capricious standard to the instant case.

Newell, 904 F.2d at 650.

The terms of this plan provide that a determination of whether plaintiff has been offered "a position that is substantially equivalent to [plaintiff's] current position . . . will be made by Allied-Signal upon consideration of whether the new position . . ." That language does more than simply designate that Allied-Signal will be the administrator of the plan. It grants Allied-Signal the authority to evaluate and determine facts, including whether an employee's prior and prospective positions are "similar." This evaluation necessarily invokes a judgmental function in analyzing the positions. Under *Firestone*, this is sufficient evidence of a grant of discretionary authority. *Firestone*, 489 U.S. at 115. Allied-Signal's decision to deny plaintiff the severance benefits may therefore be reversed only for an abuse of discretion. *See also, Madden v. ITT Long Term Disability Plan*, —— F.2d —— (9th Cir. 1990).

Plaintiff urges that this conclusion should be modified because of what he construes to be a conflict of interests

by Allied-Signal. However, *Firestone* teaches that a conflict of interests is only a "factor" in evaluating whether there was an abuse of discretion; it does not change the standard of review:

> [I]f a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'factor[] in determining whether there is an abuse of discretion.'

Firestone, 489 U.S. at 115 (quoting, Restatement (Second) of Trusts § 187, comment d (1959). This court discusses the claimed conflict factor below.

C.

Under the "abuse of discretion" standard of review, defendants move for summary judgment on the ground that Allied-Signal's denial of severance benefits was based on a reasonable interpretation of the terms of the plan, and was supported by the fact record. Plaintiff objects that Allied-Signal acted arbitrarily and capriciously, and violated due process in denying his claim.[3]

Plan administrators act arbitrarily and in abuse of their discretion if they render a decision without any explanation, or construe or apply a plan in a way "that clearly conflicts with the plain language of the plan." *Johnson v. Trustees of W. Conf. of Teamsters Pension Trust Fund*, 879 F.2d 651, 654 (9th Cir. 1989) (citing *Hancock v. Montgomery Ward Long Term Disability Trust*, 787 F.2d 1302, 1307 (9th Cir. 1986). Allied-Signal did explain its decision to plaintiff. The question

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[3] Plaintiff also asserts that he has produced substantial evidence to show that the new position was not substantially similar to his prior position, and that a triable issue is therefore raised about the reasonableness of Allied-Signal's exercise of discretion. However, showing substantial evidence is not enough when the standard of review is abuse of discretion.

is whether Allied-Signal arbitrarily construed and applied the terms of the plan. The record demonstrates that there are sufficient facts in the record for Allied-Signal to make the decision that it did, and this court cannot conclude that it acted arbitrarily or abused its discretion:

Plaintiff's original position was Vice President and General Manager of the Audio-Video Systems Division. After the reorganization, Ampex offered plaintiff the position of Vice President, Marketing, Sales and Service. The undisputed evidence shows that under both positions plaintiff was (1) a vice president, reporting directly to the chief executive officer; (2) a member of the Executive Management Committee; (3) responsible for directing a discrete section of the company, including responsibility for its personnel (*e.g.*, section, compensation, benefits, training and terminations), finances, facilities, information systems, and implementation of corporate policies, and (4) responsible for directing sales, sales analysis, accounts receivable, servicing, and marketing services. Plaintiff's new position also continued his career path as a potential candidate for chief executive officer of Ampex. And compared to his position before the sale, plaintiff's annual salary increased from $125,000 to $150,000, and his bonus potential from $70,000 to $150,000.

Plaintiff argues that there were numerous differences between his former and new positions, and as a result of those differences, plaintiff came to view his new position as a demotion.[4] However, the fact that there were some differences between the two positions is insufficient for plaintiff to establish that Allied-Signal's finding of similarity was arbitrary or an abuse of its discretion.

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[4] Plaintiff also emphasizes the declaration of his expert witness, a managing director of an executive search firm, which concluded that the two positions did not have "responsibilities similar," as that term would be understood in the marketplace for corporate executive positions.

The language of the plan says a "similar" position, not an "identical" one. Even though plaintiff can point to differences, and his expert witnesses would agree, the above facts are a sufficient record for the administrator to make the decision that it did, under the discretion vested in it.

D.

Did Allied-Signal have a conflict of interest which should be weighed in determining whether there was an abuse of discretion? Plaintiff contends that there was a conflict because Ampex was allegedly obligated to "indemnify" Allied-Signal for severance benefit payments.

Less deference is to be given to an administrator's decision, if the decision involved a "serious conflict" between the administrator and the employer. *Oster v. Barco of California Employees' Retirement Plan*, 869 F.2d 1215, 1217 (9th Cir. 1988). However, there is no evidence that Allied-Signal was financially liable for any severance benefits after the sale of Ampex. To the contrary, as plaintiff alleges in his complaint, when Allied-Signal sold Ampex to Newhill Acquisition Corporation, "Ampex assumed the obligation for the payment to plaintiff of his benefits under the Plan." [5] Allied-Signal's decision to award or deny benefits would have no impact on Allied-Signal's finances. This court's review therefore remains deferential. *Fielding v. International Harvester Co.*, 815 F.2d 1254, 1256 (9th Cir. 1987).

Allied-Signal's interpretation of the plan and denial of benefits to plaintiff was not an abuse of discretion. Defendant's motion for summary judgment on the first cause of action is therefore granted.

IV.

Plaintiff's second claim is against Ampex alone, alleging that Ampex is estopped to deny severance benefits to plaintiff. Ampex contends that it is entitled to summary

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[5] *See* Complaint at ¶ 12.

judgment on this claim for three reasons. First, estoppel cannot apply against Ampex because Ampex did not administer the plan and did not make the decision adverse to plaintiff. Second, an employee benefit plan cannot be required by estoppel to make payments that are inconsistent with the written plan. Third, there is no basis for estoppel because plaintiff admits that he resigned without seeking or receiving any assurance of his eligibility for benefits.

Defendant is correct that a plan may not be required by estoppel to make payments which are not authorized by the written plan. *Hansen v. Western Greyhound Retirement Plan*, 859 F.2d 779, 781 (9th Cir. 1988). However, an employer could be estopped, because recovery against the employer who is not the administrator would not diminish the fund. *Dockray v. Phelps Dodge Corp.*, 801 F.2d 1149, 1155 (9th Cir. 1986). *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1096 (9th Cir. 1985). Plaintiff's estoppel claim names his employer Ampex, not the plan or its administrator, and is therefore properly pleaded.

However, to survive summary judgment, plaintiff must demonstrate a triable issue of fact on the following elements:

> (1) the party to be estopped [Ampex] must know the facts; (2) [Ampex] must intend that [its] conduct shall be acted on or must so act that [plaintiff] has a right to believe it is so intended; (3) the [plaintiff] must be ignorant of the true facts; and (4) [plaintiff] must rely on [Ampex's] conduct to his injury.

Ellenburg, 763 F.2d at 1096.

It is undisputed that Ampex "knew the facts" of plaintiff's interpretation of the severance plan and his new position. The issues are what plaintiff knew and

Ampex's intent. Plaintiff alleges that in conversations with Ampex Chief Executive Officer Max Mitchell, Mitchell agreed that plaintiff's new and old positions did not have "similar responsibilities." Plaintiff confirmed his understanding of these conversations with Mitchell in two letters which were sent to both Ampex and Allied-Signal.[6]

Plaintiff also alleges that on January 22, 1988, Mitchell accepted his resignation without disagreeing with his position that he was entitled to severance benefits. However, the January 22 letter contained no discussion of severance benefits. And plaintiff cannot claim that he resigned based upon any assurance by Ampex that he would get the severance benefits. He testified at his deposition that he did not expect a reply to his letters, but sent them to "reserve his rights." The letters from plaintiff are evidence of his intent, not Ampex's. Plaintiff cannot claim that because Ampex failed to respond it adopted his interpretation, with the intent of inducing him to rely on his own assertions. Moreover, the letters show that plaintiff was not ignorant of the true facts and was aware of the similarity issue. Plaintiff therefore cannot demonstrate the second and third elements required for

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[6] Plaintiff's October 29, 1987 letter stated:

> [A]s we have agreed in several conversations over the past few weeks . . . the new position is not "substantially equivalent" to my current position in that it does not entail "similar responsiiblities."

Plaintiff's January 7, 1988 letter of resignation:

> Prior to my taking the Marketing, Sales and Service position, we thoroughly discussed and agreed that the role was vastly different in content and responsibility from that which I then held in [Ampex].
>
> After nearly four months of discussing the sales division concept with [Mitchell] . . . *I* have concluded that the role does not fulfill *my* expectations in terms of responsibility, management influence or opportunity to carry out real change is Ampex. (emphasis added).

estoppel. Summary judgment is therefore granted to Ampex on the second cause of action.

V.

Plaintiff's third claim alleges a violation of 29 U.S.C. § 1140 (1985). That statute provides:

> It shall be unlawful for any person to . . . discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . .

Plaintiff claims that after he resigned, Ampex discriminated against him by intentionally and in bad faith informing Allied-Signal that it had offered plaintiff substantially equivalent employment.

The legislative history of section 1140 reveals that it was directed at preventing unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights. *Lojek v. Thomas*, 716 F.2d 675, 680-61 (9th Cir. 1983). No claim is stated under this statute unless the employee is affirmatively or constructively discharged. *Id.*; *accord Young v. Standard Oil (Indiana)*, 660 F. Supp. 587, 597 (S.D. Ind. 1987), *aff'd*, 849 F.2d 1039 (7th Cir.), *cert. denied*, 488 U.S. 981 (1988).

Plaintiff asserts that although section 1140 is "primarily" designed to prevent employers from discharging or harassing employees who seek benefits that, this is not its only purpose. However, the cases cited by plaintiff do not support this argument. *Conciatore v. Leahy's Fuel, Inc.*, 686 F. Supp. 383 (D.C. Conn. 1988) has been withdrawn from publication. In *Furcini v. Equibank, NA*, 660 F. Supp. 1436 (W.D. Pa. 1987), the court stated that a section 1140 claim for interference with severance pay "necessarily presupposes . . . discharge." *Id.* at 1439. The *Furcini* court said that a discrimination action would be appropriate if it is based on the way the employer

characterized the discharge *Id.*; but no such claim is made here.

Plaintiff's section 1140 claim therefore fails because it is undisputed that he was not affirmatively or constructively discharged. He resigned.[7]

Plaintiff attempts to avoid that result by alleging discrimination and bad faith in the administration of the plan. Even if this allegation is actionable under section 1140, it is not supported by sufficient evidence to create a genuine issue of material fact. Plaintiff relies on two pieces of evidence. First, plaintiff construes a February 23, 1988 letter from Ampex's Secretary and General Counsel to Allied-Signal [8] as evidence of Ampex's intent to "intentionally and maliciously subject[] plaintiff to oppressive, cruel, and unjust hardship in conscious disregard of plaintiff's rights." This claim is answered by the letter itself. It is a matter-of-fact description of the relationship between Ampex and plaintiff after Ampex's reorganization. It contains no evidence of affirmative or constructive discharge, or any expression of "malice." Second, other Ampex executives were paid severance benefits even though they voluntarily resigned *after* the expiration date of the plan. However, a claim of a violation of section 1140 requires discrimination for exercising a right "under the provisions of an employee benefit plan." Ampex's conduct after expiration of the plan has no bearing on plaintiff's claim for discrimination in implementation of the plan. Defendants are therefore granted summary judgment on the third cause of action.

VI.

Plaintiff's fourth claim is under 29 U.S.C. § 1109 (1985), alleging that defendants breached their fiduciary

---

[7] *See* Letter from plaintiff to Mitchell, dated January 7, 1988: "I regret to inform you of my intention to resign from Ampex."

[8] Decl. of Leflar, Ex. B.

duties by failing to pay benefits to which he was entitled under the plan.

There are two defects in this claim. First, as discussed above, plaintiff is not entitled to severance benefits because Allied-Signal did not abuse its discretion in denying him benefits. Second, section 1109 does not give a right of action to individual beneficiaries of a plan, only to the plan itself. *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985). It does not convert every dispute over a claim for benefits into a breach of fiduciary duty if the claim is denied. Section 1109 was designed to protect the assets of the plan from the improper acts of those controlling those assets.

Plaintiff argues that *Russell* permits a participant to recover benefits from a fiduciary. Indeed; but that result was based on other statutes, not on section 1109, and the complaint does not allege violations of those other statutes.

Finally, plaintiff claims that he is entitled to relief under section 1109 on the grounds that it provides for "other equitable or remedial relief as the court may deem appropriate." However, as stated, the remedies run to the plan and not to the beneficiary. *Russell*, 473 U.S. at 144.

VII.

Plaintiff's brief in opposition to the summary judgment motion adds several arguments that plaintiff was denied due process. No claim for denial of due process is stated in the First Amended Complaint. However, even assuming that plaintiff's arguments are properly raised, the record demonstrates that plaintiff received the process that he was due.

ERISA requires written notice of the reasons why an application for benefits is denied, and a reasonable opportunity for a full and fair review of the denial by an appropriate fiduciary. 29 U.S.C. § 1133 (1985); *White*

v. Jacobs Engineering Group Long Term Dis. Ben. Plan, 896 F.2d 344, 349 (9th Cir. 1989).

Specifically, every employee benefit plan shall:

> (1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and
>
> (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

29 U.S.C. § 1133; *see also* 29 C.F.R. § 2560.503-1(f) (1990).

It is undisputed that plaintiff received a copy of the plan in November 1986. After Ampex's reorganization, plaintiff informed Ampex of his position on severance benefits in a series of discussions during August through October 1987. Plaintiff's letter of acceptance stated in detail his view that the new position was not "substantially equivalent." His letter of resignation and letter to Allied-Signal reiterated his position. A follow-up letter was sent by plaintiff to Russell Hawkins at Allied-Signal on February 3, 1988. On February 23, 1988, Ampex wrote Allied-Signal, explaining its position on plaintiff's claim for benefits. Hawkins read Ampex's letter to plaintiff over the phone, and later sent plaintiff a copy. Hawkins informed plaintiff by phone on March 2, 1988 that his claim for severance benefits was denied, and that this decision was based on the February 23 letter from Ampex and plaintiff's letters of October 29, 1987, January 7, 1988, and February 3, 1988.

Allied-Signal's procedures were somewhat informal. However, the record shows that plaintiff received written notice in a manner calculated to be understood by him,

setting forth the specific reasons for the denial of his claim, and with reference to the pertinent plan provisions, as required by section 1133(a) and 29 C.F.R. § 2560.503-1(f). Plaintiff's own letters show that he understood the issues and the terms of the plan.

Plaintiff claims that he was denied a right of reconsideration. However, a March 8, 1988, letter from the plan administrator, addressed plaintiff's "appeal." The letter sets out in detail the reasons for the denial of plaintiff's claim. A further statement of plaintiff's position and a request for review was made by plaintiff's attorney on March 15, 1988. The administrator reviewed the letter and declined further reconsideration.

Plaintiff has received the "due process" required by section 1133 and 29 C.F.R. § 2560.503-1(f), and defendants are entitled to summary on that argument.

IT IS SO ORDERED.

DATED: October 26, 1990.

/s/ Charles A. Legge
CHARLES A. LEGGE
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-89-0682-CAL-TSC

DONALD F. BOGUE,

Plaintiff,

vs.

AMPEX CORPORATION, ALLIED-SIGNAL INC., and DOES 1-10, inclusive,

Defendants.

ORDER

[Filed August 11, 1989]

The motion of defendants *AMPEX CORPORATION* and *ALLIED-SIGNAL INC.* for summary judgment dismissing all claims in the "Complaint for Breach of Contract, Wrongful Termination of Employment, and Interference with Contract" came on regularly for hearing on July 28, 1989 together with plaintiff's motion to remand to state court. Bruce H. Munro, Esq. appeared for plaintiff and John R. Leflar, Esq. appeared for defendants. The Court having considered the papers submitted and the arguments of counsel, and good cause appearing, the motion for summary judgment is GRANTED and the motion to remand is DENIED.

IT IS HEREBY ORDERED that all claims in the complaint are dismissed on the ground that they are preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"). There is no genuine issue as to any material fact and defendants are entitled to a

judgment as a matter of law. Plaintiff shall have 30 days to amend his complaint to state claims under ERISA instead of state common law claims.

Dated: Aug. 11, 1989

/s/ Charles A. Legge
CHARLES A. LEGGE
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-15038

D.C. No. CV-89-0682 CAL

DONALD F. BOGUE,
Plaintiff-Appellant,

v.

AMPEX CORPORATION and ALLIED-SIGNAL, INC.;
DOES 1-10, INCLUSIVE,
Defendants-Appellee.

ORDER

[Filed November 23, 1992]

Before: WISDOM *, BEEZER, and TROTT, Circuit Judges.

The panel has voted to deny the petition for rehearing filed by appellant on October 21, 1992.

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* The Honorable, John Minor Wisom, United States Circuit Judge for the Fifth Circuit, sitting by designation.

APPENDIX E

ALLIED SIGNAL

Allied-Signal Inc.
P.O. Box 3000R
Morristown, NJ 07960-2496
Telephone: (201) 455-2389

Gerard L. Seelig
Executive Vice President

November 10, 1986

Donald F. Bogue
Participation in Allied-Signal, E&I Sector
Special Compensation Program for Designated
Key Executives

Dear Don:

As you know, Allied-Signal has indicated that it plans to sell various businesses in the E&I Sector, including Ampex. As one of our key executives, we appreciate your importance to the ongoing operations of the company and to its successful sale.

To alleviate some of your financial concerns and to encourage your continued support and cooperation, I am pleased to confirm your participation in the special compensation program—the terms of which are annexed.

In addition, I want to assure you that the annexed Salary Continuation Program (i.e. severance pay) will continue to cover you up to the sale of the business. I also want to assure you that if your employment is terminated by the buyer, (except for cause) during the 12 month period following the sale we will make up the difference between the buyer's severance pay program and the annexed Plan.

If you have any questions, please feel free to call Tom Rea at extension 6711.

/s/ Jerry Seelig
G. L. SEELIG

Allied-Signal/E&I Sector
Special Compensation Program for
Designated Key Executives:

Stay Bonus

Donald F. Bogue:

1. *Amount.* $100,000. half conditioned on remaining with Allied Signal through the Compensation Date and half conditioned on remaining with the buyer for 90 days, such payments to be made within 30 days after each event or a later date agreed upon by you and Allied-Signal.

2. *Eligibility.* Continued service through the Completion Date, which is the earlier of:

   (1) The closing date for the sale of the company; or

   (2) 12 months from 12-1-86, subject to a 90-day extension if Allied-Signal determines that it will be engaged in active discussions with a potential buyer during that extension period.

3. *Effect of Termination.*

   (1) Prior to the sale date if your employment is terminated by Allied-Signal, other than for cause, you will receive the full Stay Bonus. After the sale date, a rejection or an acceptance of continued Allied-Signal employment in any capacity will not negate your eligibility for the Stay Bonus.

   (2) If your employment is "terminated" by the buyer prior to completion of 90 days of ongoing service with the buyer, other than for cause, Allied-Signal will pay the second half as well as the first half of the Stay Bonus. You will be considered as "terminated" by the buyer if you are not offered continued employment in a position that is substantially equivalent to your cur-

rent position. This determination will be made by Allied-Signal upon consideration of whether the new position:

(i) has compensation and benefits with a value not less than 90% of your current compensation and benefits, not including stock options, restricted units/shares, performance units and your qualified Savings Plan;

(ii) is located not more than 50 miles from your current work location; and

(iii) has responsibilities similar to those of your current position.

Allied-Signal/E&I Sector
Special Compensation Program For
Designated Key Executives:

Sale Price Incentive

Donald F. Bogue:

In consideration of your service in connection with the contemplated sale of Ampex and on condition that you continue your employment through the closing date of such sale, you will be paid a Sale Price Incentive as follows:

Purchase Price	Incentive ($)
375 and Below	0
over 375M	$2,000 per million

Purchase Price is the price used to calculate the fee paid to the Investment Banker by Allied-Signal for the sale of this business.

This Sales Price incentive will be paid within 30 days after the closing date of the sale or a later date agreed upon by you and Allied-Signal.

* * * *

This program will terminate on March 31, 1988.

Allied-Signal/E&I Sector
Special Compensation Program for
Designated Key Executives:

Severance Pay

Donald F. Bogue:

We are extending the terms of the existing severance program as follows:

In the event (1) your employment is terminated by Allied-Signal, other than for cause, prior to the sale date, or (2) Neither Allied-Signal nor the Buyer offers you "substantially equivalent" employment and your employment is terminated, or (3) your employment is terminated by the buyer, other than for cause, within one year after such acquisition, Allied-Signal will make up the difference between the buyer's severance pay program and the following:

- 18 months severance pay

Pay Definition

Pay is defined to include base salary and annual incentive compensation. Annual incentive compensation shall mean the lesser of the last average percentage award for employees in similar positions or the individual's average percentage incentive award in the last three incentive periods (or such lesser period as the executive may have been employed) times the current base salary. Long-term performance incentive awards shall not be considered in determining annual incentive compensation.

Benefits

All benefits, except as otherwise provided by the terms of the controlling plan, will be continued during the period unless similar benefits are provided by a subsequent employer. For pension purposes, only the first twelve months of severance and the base pay thereof

will be used for vesting and pension calculations; the normal policy for qualifying leaves remains applicable thereafter. Fringe benefits, such as automobiles or memberships, will not be continued during the period.

- Professional outplacement assistance.

The determination of "Substantially equivalent" position will be made by Allied-Signal upon consideration of whether the new position:

(i) has compensation and benefits with a value not less than 90% of your current compensation and benefits, not including stock options, restricted units/shares, performance units and your qualified Savings Plan;

(ii) is located not more than 50 miles from your current work location; and

(iii) has responsibilities similar to those of your current position.

* * * *

This program will terminate on March 31, 1988.

APPENDIX F

STATUTORY PROVISIONS INVOLVED

29 U.S.C. section 1002(1) provides as follows:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. section 186(c) provides as follows:

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase

of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by

the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, (B) child care centers for preschool and school age dependents of employees, or (C) financial assistance for employee housing: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply

to such trust funds: *Provided further*, That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.]; or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

Supreme Court, U.S.
FILED
MAR 23 1993
OFFICE OF THE CLERK

No. 92-1383

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

DONALD F. BOGUE,
Petitioner,

VS.

AMPEX SYSTEMS CORPORATION and ALLIED-SIGNAL INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly held that a severance plan was subject to ERISA as an employee welfare benefit plan where the plan was established by a parent corporation covering key employees of a wholly-owned subsidiary and provided severance benefits (professional out-placement assistance, severance pay for periods ranging from 18 months to 2 years and continuation of other benefits, including pension benefits, other than car and memberships, for a shorter period) to employees determined to be eligible.*

2. Whether the courts below correctly interpreted the language of the severance plan portion of the 1986 Allied-Signal/E&I Sector Special Compensation Program for Designated Key Executives as granting the administrator discretionary authority to determine eligibility for benefits or to construe the terms of the plan.

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* "ERISA" is an acronym for the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461, as amended (1990).

STATEMENT PURSUANT TO RULE 29.1

Respondents are Allied-Signal Inc. and Ampex Systems Corporation (successor-in-interest of Ampex Corporation). Allied-Signal Inc. has no parent corporation; its nonwholly-owned subsidiaries are listed below.** Ampex Systems Corporation has no

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** ACE Insurance Company (Bermuda), Ltd.; ACE Insurance Company, Ltd.; ACE, Limited; AIFCO Filters (Egypt); ASA Investerings (Partnership); Allied-General Nuclear Services (Partnership); Amoricaine de Fonderie Le Chatelet, S.A.; Asia Pacific Resin Corporation; Bendix Atlantic Inflator Company (Partnership); Bendix Electronic Service Corporation de Espaa, S.A.; Bendix Espaa, S.A.; Bendix Europe Services Technique S.A.; Bendix Europe, S.A.; Bendix Group Superannuation Pty., Ltd.; Bendix Mexicana, S.A. de C.V.; Bendix Mintex Proprietary Limited; Bendix Otomotiv Sanayi Ve Ticaret, A.S.; Bendix-Jidosha Kiki Corporation; Bunker Ramo Electronic Data Systems S.A.; CFE Company (Partnership); Cataleasco, Inc.; Central Nice, Ltd.; Chico Corporation; Coalition Remedial Efforts, Inc.; Compania Industrial de Fluorita, S.A.; Compania Metalurgica de Parral, S.A.; Coopers Filters, Ltd.; D.B.A. S.I.B.E., SNC (Partnership); Delaney Gallay Dynamics, Ltd.; Don Brake Lenings Pty.; Don Eastern Sdn Bhd; Doosan Electro-Materials Co., Ltd.; Dynamic Turbocharger Services Pty., Ltd. Queensland; Dynamic Turbocharger Services Pty., Ltd. Victoria; FDA East Glass Fiber Co.; Ferranti plc; Ferranti-Bendix Power Generation Limited; FIAAM Filter S.p.A.; Fram Canada; Fram Espaa S.A.; Fram Europe A.B.; Fram Europe B.V.; Fram Europe Limited; Fram Europe (Marketing) A.B.; Fram Filter, S.p.A.; France Automobile Service, S.A.; Garrett Comtronics Licensing Corp.; Garrett Turbo India, Ltd.; Globe Auto Electricals, Ltd.; Greyco, S.A.; Heavy Vehicles Systems Group Limited; HBH Company (Partnership); Hankuk Brake Industrial Co., Ltd.; Industrial Turbines International Inc.; International Robomation Intelligence Inc.; International Technigroup Inc.; International Turbine Engine Corporation; Investech; ITI-GISA; Japan Gasoline Co., Inc.; Jidosha Kiki Co., Ltd.; JSR Allied Corporation; Kalyani Brakes Limited; Kanto Seiatsu Kogyo Co., Ltd.; Katalistiks International Inc.; La Industrial Plastica y Metalurgica, S.A.; Leaseway AllServices, Inc.; Light Helicopter Turbine Engine Company (Partnership); Lucas Air-Equipment S.A.; Lucky Allied Plastics Corporation; Manbritt Industries, Inc.; Morristown Airport Customs Association (Partnership); Morton Bendix Company (Partnership); NGL (Singapore) Pty., Ltd.; Niigata Technos Co., Ltd.;

subsidiaries that are not wholly-owned; its parent corporation is Ampex Incorporated.

Nikki-Universal Co., Ltd.; Nippon Amorphous Metals Co., Ltd.; Nirlon Synthetic Fibres and Chemicals, Ltd.; Nitto Boseki Company Ltd.; Nittobo-Norplex/Oak Co., Ltd.; Normalair Garrett (Holdings) Ltd.; Normalair Garrett Manufacturing Pty., Ltd.; Normalair Garrett Pty., Ltd.; Normalair Garrett, Ltd.; Norplex Oak India Limited; Oak-Mitsui (Partnership); Oak-Mitsui Inc.; Paxon Polymer Company (Limited Partnership); Prestolite of India Ltd.; Propelentes Mexicanos, S.A.; Quimobasicos, S.A.; Rovert (1987), Ltd.; SAPDCO Bendix (Saudi Arabia) Limited; Seo Han-Bendix Company Limited; Shanghai UOP-UCC Molecular Sieve Co., Ltd.; Sifra Industrie, S.A.; Societe Anonyme des Usines Chausson; Societe d'Etudes et de Constructions AeroNavales [SECAN]; Stop Iberica, S.A.; Synektron Corporation; TAC (Aircraft Controls), Ltd.; Technofon; Technos Co., Ltd.; TENSA, S.A.; Transitions Two; Transpar Iberica, S.A.; Turbodina S.A.I.Y.C.; UMP Limited; Union Showa K.K.; Unitrode; Universal Assets Inc.; Universal Oil Products Company; UOP (Partnership); UOP B.V.; UOV Canada Inc.; UOP Charitable Foundation, Inc.; UOP Dubai Limited; UOP Equetec Services, Inc.; UOP France, S.A.; UOP GmbH; UOP Iberia, S.A.; UOP Inc.; UOP International Services Limited; UOP International Technology Limited; UOP K.K.; UOP Limited; UOP Management Services, Inc.; UOP Management Services (Saudi Arabia) Limited; UOP M.S. S.p.A.; UOP N.V.; UOP Pacific Ltd.; UOP Process International, Inc.; UOP Processos Industrials do Brasil Ltda.; UOP S.p.A.; USHA Amorphous Metals Ltd.

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No. 92-1383

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OCTOBER TERM, 1992

DONALD F. BOGUE,
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AMPEX SYSTEMS CORPORATION and ALLIED-SIGNAL INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Donald F. Bogue, plaintiff below, seeks severance benefits under a severance plan established by respondent Allied-Signal Inc. as part of a special compensation program covering key employees of its wholly-owned subsidiary respondent Ampex Corporation. The program was established at a time when Allied Signal proposed to sell Ampex.[1] The severance plan provided for severance benefits if "[n]either Allied-Signal nor the Buyer offers

[1] Besides the severance plan, the program contained a "stay bonus" of $100,000 conditioned on the employee's remaining with Ampex for 90 days after the sale, and a "sale price incentive" payment based on the purchase price to Allied-Signal upon the sale of Ampex. Pet.Appx. at 35a-40a. Only the severance plan is in dispute here.

you 'substantially equivalent' employment and your employment is terminated." Pet.Appx. at 39a. Severance benefits were to include 18 months severance pay, continuation of other benefits, including pension benefits (other than car and memberships) unless provided by a subsequent employer, and professional outplacement assistance. *Ibid.* The plan further provided:

> The determination of "Substantially equivalent" position will be made by Allied-Signal upon consideration of whether the new position:
>
> (i) has compensation and benefits with a value not less than 90% of your current compensation and benefits * * *;
>
> (ii) is located not more than 50 miles from your current work location; and
>
> (iii) *has responsibilities similar to those of your current position.*

Pet. Appx. at 40a (emphasis added).

In May 1987, Allied-Signal sold Ampex Corporation. Pursuant to the sale agreement, Ampex assumed liability for the plan; Allied-Signal remained plan administrator. Pet. Appx. at 3a.

Petitioner's "current" position when the plan was adopted was Vice President of Ampex's Audio-Video Systems Division. Pet.Appx. at 2a.

After the sale of Ampex, petitioner was offered the position of Vice President of Marketing, Sales and Service of Ampex. Pet.Appx. at 3a. Petitioner accepted the new position, but soon resigned. Petitioner then applied to Allied-Signal for severance benefits, claiming that the new position he had been offered was not "substantially equivalent" to the position he had held prior to the sale. *Ibid.* Allied-Signal determined that the two positions were "substantially equivalent", and rejected petitioner's claim. Petitioner filed suit in state court alleging various common law causes of action. The case was removed to the federal district court on the ground that the action was governed by ERISA. The district court denied a motion for remand. Pet.Appx. at 32a-33a.

Petitioner filed an amended complaint specifically seeking severance benefits under ERISA. Pet.Appx. at 18a. Respondents moved for summary judgment on the ground that the plan administrator's eligibility determination was not an abuse of discretion. The district court granted the motion (Pet. Appx. at 16a) and entered judgment for respondents. Petitioner's motion for reconsideration was denied. Appellant's Excerpt of Record (filed in the Ninth Circuit), p. 120. The court of appeals, in an opinion by The Honorable John Minor Wisdom, United States Circuit Judge for the Fifth Circuit, sitting by designation, affirmed. 976 F.2d 1319, 1327.[2]

REASONS WHY THE WRIT SHOULD BE DENIED

Both the trial court and the court of appeals correctly held petitioner's claims subject to ERISA because they arose under a severance program that required an ongoing administrative scheme. 976 F.2d at 1322-24. Though petitioner urges this Court to use this case to "establish a rule" (Pet. at 8) that draws a line between employee benefit plans and non-ERISA compensation programs on the basis of the employer's purpose, that issue was not raised in the Ninth Circuit.[3] It is undisputed that the question

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[2] Because petitioner failed to seek an interlocutory appeal of the order denying petitioner's motion to remand, his request that the Court review whether ERISA provided a basis for *removal* of his state court action to the district court and his argument concerning preemption are not preserved except as to the question whether the district court would have had jurisdiction had the case originally been filed in that court. *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 702 (1972). The issue is further limited to whether the district court had jurisdiction over petitioner's *amended* complaint, by which petitioner specifically invoked ERISA. *Kidd v. Southwest Airlines, Co.*, 891 F.2d 540, 545-547 (5th Cir. 1990).

[3] Petitioner erroneously contends that he raised this issue in the Ninth Circuit by arguing that the severance plan was not established or maintained by his employer, or anyone acting on behalf of the employer. Pet. at 11, n.4. But whether a plan was "established or maintained" by an "employer" is a completely different question than whether particular benefits are covered by ERISA. Moreover, under the pleadings of the

of coverage under ERISA arose only as to the *severance* plan that was part of the "Allied-Signal/E&I Sector Special Compensation Program for Key Executives", not the bonuses offered under separate parts of the program. Pet.Appx. at 3a, n.3. Petitioner also acknowledged below that "severance benefits are an 'employee welfare benefit' which ERISA may regulate", and argued that the test for ERISA application is whether the program necessitates "ongoing administration." See Appellant's Opening Brief filed by petitioner in the Ninth Circuit ("AOB"), pp. 11-12, citing *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). Both the district court and the court of appeals applied the *Fort Halifax* test to the Allied-Signal plan and found that an ongoing administrative scheme was required, because a determination of eligibility for benefits was required each time a participant might leave his employment. Pet.Appx. at 5a-7a. Petitioner's assertion that the Ninth Circuit has "split with the Fifth Circuit on this issue" (Pet. at 8) is contradicted by the Ninth Circuit's decision and is totally without merit.

Likewise, no reason exists for this Court to review or analyze the particular terms of the severance plan, which both the district court and the court of appeals interpreted as granting discretionary authority to the plan administrator to construe plan terms and determine eligibility for benefits. Both courts below carefully analyzed the particular terms of the plan in the light of this Court's holding in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). Contrary to the petition, the decision below does not conflict with any other circuit court decision and is unlikely to affect other litigants. Moreover, the decisions of the courts below are correct.

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case, there was no genuine issue whether the severance plan was established or maintained by petitioner's employer. See p. 9, n. 7, post.

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE SEVERANCE PLAN WAS COVERED BY ERISA.

A. The Requirement of an Administrative Scheme.

The court of appeals properly rejected petitioner's argument that the Allied-Signal severance benefit plan did not require an administrative scheme:

> Although the program, like the plans in *Fort Halifax* and *Wells*, was triggered by a single event, that event would occur more than once, at a different time for each employee. * * * Although its application was uncertain, its term was short, and the number of its participants was small, the program's administration required a case-by-case, discretionary application of its terms. * * *; there was no way to administer the program without an administrative scheme. We hold that Allied-Signal was obligated to apply enough ongoing, particularized, administrative, discretionary analysis to make the program in this case a "plan."

976 F.2d at 1323.

Petitioner, claiming that the Ninth Circuit has "split with the Fifth Circuit on this issue" (Pet. at 8), cites *Wells v. General Motors Corp.*,[4] and *Fontenot v. NL Industries, Inc.*,[5] in which the Fifth Circuit analyzed quite different programs that did not involve ongoing administrative schemes. Petitioner's claim that the Ninth Circuit is in conflict with the Fifth Circuit should be compared with the Ninth Circuit's opinion, which makes plain that that court is not in disagreement with the Fifth Circuit:

> In finding that the program is susceptible to ERISA preemption * * * we choose to follow the approach of the Third Circuit in considering a severance plan similar to the program in this case, *and a more recent Fifth Circuit case that narrows the broader implications of Wells.*
>
> * * *

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[4] *Wells v. General Motors Corp.*, 881 F. 2d 166 (5th Cir. 1989).

[5] *Fontenot v. NL Industries, Inc.*, 953 F.2d 960 (5th Cir. 1992).

> The reasoning of a recent Fifth Circuit case, *Fontenot v. NL Indus., Inc.*, * * * looks to whether the plan in question " 'require[s] an administrative scheme' because 'the circumstances of each employee's termination [have to be] analyzed in light of [certain] criteria.' " *We adopt this approach, which places the Allied-Signal program on the ERISA side of that fence.*

976 F.2d at 1322-1323 (footnotes omitted, emphasis added).

Petitioner's related contention that the Fifth Circuit's decision in *Fontenot* conflicts with the Third Circuit's decision in *Pane v. RCA Corp.*, 868 F.2d 631 (3d Cir. 1989) (Pet. at 9) is likewise belied by the Fifth Circuit's opinion in *Fontenot*:

> The decision in *Pane v. RCA Corp.*, 667 F.Supp. 168 (D.N.J. 1987), *aff'd*, 868 F.2d 631 (3d Cir. 1989), relied upon [by] Fontenot in support of his position, does not prescribe a different conclusion. There, the severance agreements "required an administrative scheme," 868 F.2d at 635, because "the circumstances of each employee's termination [had to be] analyzed in light of [certain] criteria." 667 F.Supp. at 170-171. In contrast, NL Industries' severance plan requires no administrative scheme because those employees included in the plan were to receive benefits upon termination regardless of the reason for termination.

Fontenot, supra, 953 F.2d at 962-963.

In the present case, unlike *Fontenot, Wells* and *Fort Halifax*, employees covered by the Allied Signal plan were *not* to receive benefits regardless of the circumstances. The circumstances of each employee's termination had to be analyzed in light of criteria. Compare *Fontenot*, supra, 953 F.2d at 962-963. As the Ninth Circuit pointed out: "[T]here was no way to administer the program without an administrative scheme." 976 F.2d at 1323. This holding is not inconsistent with any other decision.

B. The Employer's Purpose.

Petitioner further claims to find a conflict among the decisions of the Fourth, Fifth, Ninth and Eleventh Circuits in the holding that the Allied-Signal plan involved a type of benefit covered by

ERISA. Pet. at 10. Aside from the fact that petitioner did not raise this issue in the court of appeal (see note 3, ante), none of the cases cited involve the issue whether severance plans are covered by ERISA.[6]

For example, in *Murphy v. Inexco Oil Co.*, 611 F.2d 570 (5th Cir. 1980), cited at page 10 of the petition, the Fifth Circuit held that a bonus plan that provided extra compensation *during employment* (through fractional shares in an oil and gas royalty) was not covered by ERISA. The court pointed out that the participation shares in the royalty were transferred to the employees during their active employment. The fact that the royalty payments might continue after an employee's retirement or death did not, the court held, convert them to death or retirement benefits, but was due to the inherent characteristic of royalty interests, namely, that they were paid on gas or oil production whenever realized. Nothing in *Murphy* suggests that a plan for *severance* benefits is not covered by ERISA because it may constitute part of the incentive for the employees' services. Post-employment benefits are almost invariably offered or bargained for as part of the incentive for current services.

In arguing that the Allied-Signal severance plan is not within the contemplation of ERISA, petitioner cites cases and draws conclusions pertinent to ERISA "employee *pension* benefit plans," which are subject to vastly different rules than "employee *welfare* benefit plans." For example, in *Fraver v. North Carolina Farm Bureau Mut. Ins. Co.*, 801 F.2d 675 (4th Cir. 1986), the Fourth Circuit held that an insurance agent's employment contract did not create an ERISA *pension* plan because the post-termination benefits provided thereunder were not retirement income. Petitioner concludes from these cases that:

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[6] It is beyond dispute that severance plans are covered by ERISA as "employee welfare benefit plans." See, e.g., *Massachusetts v. Morash*, 490 U.S. 107, 116 (1989); *Fort Halifax Packing Co. v. Coyne*, supra, 482 U.S. 1, 7 (1986); *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140, 1144-1146 (4th Cir. 1985), affirmed, 477 U.S. 901 (1986); *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320, 324-326 (2d Cir. 1985), affirmed, 477 U.S. 901 (1986).

> If the primary purpose is to provide *post*employment benefits, it is an ERISA plan. If the primary purpose is to provide an incentive for current services, it is not an ERISA plan, even if it incidentally provides for post-employment benefits.

Pet. at 11 (emphasis added).

The folly of adopting this distinction for welfare plans is clear, in light of the statute, which includes benefits that are plainly incentives for current services:

> (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, * * * or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds * * *.

29 U.S.C. § 1002(1).

Petitioner creates further confusion by framing the issue as one of ERISA coverage with respect to the *entire* Allied-Signal program, including the "stay bonus" and "sale price incentive." Pet. at 11. However, only the Allied Signal *severance* plan is at issue in this case. Pet. Appx. at 3a.

C. The "Employer" Issue.

The petition is also in error in asserting that the case presents an "important ERISA definitional issue of what constitutes an 'employer' under the statute." Pet. at 12. The court of appeals held:

> When a corporation establishes an employee benefit plan for the employees of its wholly owned subsidiary and retains the duty to administer that plan, and when the subsidiary bears the financial burden of funding it, the plan is "established or maintained by an employer" and is accordingly controlled by ERISA.

976 F.2d at 1323-24.

Petitioner does not even claim there is a conflict in the circuits on this point, and there is not. Moreover, the Ninth Circuit holding is correct. Were the rule otherwise, it would yield the absurd result that an employer could avoid ERISA by structuring

itself as a holding company that provides benefits for the employees of its operating subsidiaries.[7]

II. THE LOWER COURTS' HOLDINGS THAT THE PLAN ADMINISTRATOR HAD DISCRETIONARY AUTHORITY TO CONSTRUE PLAN TERMS AND DETERMINE ELIGIBILITY FOR BENEFITS TURN UPON AN ANALYSIS OF THE PARTICULAR PLAN TERMS AND RAISE NO IMPORTANT QUESTION FOR SETTLEMENT BY THIS COURT.

Both the district court and the court of appeals construed the plan terms as giving the administrator discretionary authority to determine eligibility for benefits and to interpret the plan. Accordingly, under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), the administrator's decision was reviewed under the abuse of discretion standard. The court of appeals pointed out:

> Employees who lose promised benefits should not lose the additional benefit of judicial review because their employer reserved discretionary power to itself without making that reservation clear. But when a plan includes even one important discretionary element, and the power to apply that element is unambiguously retained by its administrator, we may not second-guess the exercise of that discretion. The program's beneficiaries were on notice that Allied-Signal had such discretion over determining whether their responsibilities were substantially reduced; we can reverse the exercise of such discretion only when it has been abused.

976 F.2d at 1325.[8]

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[7] Contrary to the petition, the present case presents no genuine issue whether the plan was established by petitioner's "employer." Petitioner's complaint in the district court alleged that both Ampex and Allied-Signal were petitioner's "employers" within the meaning of 29 U.S.C. § 1002(5). Appellant's Excerpt of Record (filed in the Ninth Circuit) (hereinafter "AER"), p. 19, ¶ 10. That allegation was admitted by both defendants. AER, p. 31, ¶ 7 (Ampex); AER, p. 37, ¶ 7 (Allied-Signal).

[8] On this point, Appendix A of the Petition misquotes the court of appeals' decision. Appendix A quotes the opinion as saying:

Petitioner now erroneously contends that the Ninth Circuit is in conflict with other circuits *in its interpretation of the terms* of the Allied-Signal plan.

But the petition's elaborate attempt to construct a "conflict" among the circuits on this issue (Pet. at 14-20) is to no avail. Although petitioner cites a large number of cases, each decision is made against the backdrop of a particular set of plan provisions. The rulings indicate no more than that decisions interpreting benefit plans turn upon their own facts. It is inevitable, in the four years following *Bruch*, that parties will argue that particular plan language is either similar enough to or too dissimilar from plan language construed in other cases to achieve a particular result. See, e.g., *Wildbur v. Arco Chemical Co.*, 974 F.2d 631, 637 (5th Cir. 1992). As the Fifth Circuit pointed out in *Wildbur*, a court must read a plan "as a whole" (974 F.2d at 637) to determine if, in its judgment, it satisfies the *Firestone* criteria. Given the variety of plans and differences in plan language, there are and will continue to be cases on both sides of the line. This does not show a conflict among the circuits. Nor does the fact that courts generally must read the plans under the *Firestone* criteria suggest that this Court must review each such reading.

Petitioner purports to find the *Bogue* decision in conflict with the decisions of no less than seven other circuits. Pet. at 14. For example, the petition asserts that the Sixth Circuit is "in clear conflict" with *Bogue* (Pet. at 16), citing *Johnson v. Eaton Corp.*, 970 F.2d 1569 (6th Cir. 1992) and *Brown v. Ampco-Pittsburgh Corp.*, 876 F.2d 546 (6th Cir. 1989). But in *Johnson*, the Sixth Circuit found that the particular plan it was considering conferred

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> But when a plan includes even one element is unambiguously retained by its administrator, we may not second-guess the exercise of that discretion.

Pet. Appx at 10a. The court of appeals' decision actually reads:

> But when a plan includes even one important discretionary element, and the power to apply that element is unambiguously retained by its administrator, we may not second-guess the exercise of that discretion.

976 F.2d at 1325.

discretion, so that a deferential standard of review was proper. That holding clearly does not conflict with *Bogue*. And in the *Brown* case, unlike *Bogue*, there was no basis in the plan for any judgment or discretion in determining eligibility for benefits. The Sixth Circuit pointed out that under the plan involved in *Brown*, once the employer made a decision not to recall an employee who had been laid off, eligibility for benefits was "automatic." 876 F.2d at 550. Thus, the issue in *Brown* was reduced to whether plaintiffs were entitled to benefits under a 1984 plan, before it was amended in 1986, or a later version. The finding that the administrator had no discretion on that issue is not in conflict with *Bogue*.

There is also no conflict between *Bogue* and Second Circuit decisions. In *Masella v. Blue Cross & Blue Shield of Conn.*, 936 F.2d 98 (2d Cir. 1991) (Pet. at 18), the claim that the plan granted discretion to Blue Cross was based on the argument that since Blue Cross had had discretion to establish the terms of the plan in the first instance, it had discretion to interpret the terms later. 936 F.2d at 103. The Second Circuit's rejection of that argument is in no way inconsistent with the court of appeal's decision in *Bogue*.

The petition erroneously asserts that the Seventh Circuit "directly conflicts with" *Bogue* (Pet. at 16), citing *Petrilli v. Drechsel*, 910 F.2d 1441 (7th Cir. 1990) and *Ziaee v. Vest*, 916 F.2d 1204 (7th Cir. 1990). However, in *Petrilli* the Seventh Circuit, applying the maxim "expressio unius est exclusio alterius," pointed out that the pension plan in question

> explicitly grants plan administrators the discretion to determine whether the employee has been offered "suitable long-term employment," but does not similarly provide for discretionary interpretation of the word "layoff".

910 F.2d at 1447. In *Ziaee*, the Seventh Circuit found that the provision "[t]he Trustees shall determine, in view of the current circumstances and needs of the Plan, the [allocation of investments]" *did* grant discretionary authority over investment strategies, but that the grant did not extend to the computation of benefits. 916 F.2d at 1206-1207. Neither of these cases conflicts with the court of appeals' decision here. Specifically, Allied-

Signal clearly had authority to determine the "substantially equivalent position" issue, which is the only issue Allied-Signal determined.

Nor is there conflict with the Fifth Circuit. *Wildbur v. Arco Chemical Co.*, 974 F.2d 631 (5th Cir. 1992) held that the district court had erred in applying a de novo standard of review, based on a finding that the plan terms granted discretionary authority to determine benefit eligibility. While the plan language in *Wildbur* is different than in this case, there is manifestly no conflict. In *Cathey v. Dow Chemical Co. Medical Care Program*, 907 F.2d 554 (5th Cir. 1990), the Fifth Circuit held that the following plan provision merely allocated authority between the plan administrator and the plan fiduciary:

> * * * such insurance company (and *not* the Plan Administrator) shall be the "Named Fiduciary" of the Plan with regard to any review and *final decision on a claim for benefits* under such policy.

907 F.2d at 559, n.6 (emphasis in original). Here, however, the Allied-Signal plan did not allocate authority between Allied-Signal and anyone else, but provided that Allied-Signal would make a "determination" of whether the position was "substantially equivalent" based on "consideration of" a nonquantifiable and therefore necessarily judgmental factor ("similar responsibilities").[9]

The other circuit court cases[10] which petitioner contends are in "conflict" with the Ninth Circuit's decision did not even discuss any specific language: *Allen v. Adage, Inc.*, 967 F.2d 695, 698 (1st

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[9] The Allied-Signal plan did not specify the weight to be given any of the three factors to be considered in determining "substantially equivalent position" (compensation, location, and similarity of responsibilities), nor did it specify a standard for determining the third factor. Those matters were left to Allied-Signal's judgment and discretion.

[10] Petitioner also cites a district court case, *Clark v. Bank of New York*, 801 F.Supp. 1182 (S.D.N.Y. 1992), which "decline[d] to follow" the *district* court's opinion in the present case. The district court in *Clark* did not cite *any* circuit court decision in reaching its conclusion.

Cir. 1992) ("nothing in the Plan indicates that another approach is to be used"); *Bellino v. Schlumberger Technologies, Inc.*, 944 F.2d 26, 29 (1st Cir. 1991) (defendant "points to no language in the Plan giving it the 'discretionary authority' required for that standard"); *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075, 1077-79 (4th Cir. 1989) (no plan language quoted, but the case involved objective eligibility standards (age, service and employer assent)); *Schultz v. Metropolitan Life Ins. Co.*, 872 F.2d 676, 678 (5th Cir. 1989) ("[n]either party has pointed to any provision in the Plan which gives the administrator discretionary authority to determine benefit eligibility or to construe the plan terms").[11]

The petition is also misleading in asserting conflicts involving other circuits on this issue. For example, the petition cites *Luby v. Teamsters Health, Welfare & Pen. Tr. Funds*, 944 F.2d 1176 (3d Cir. 1991), as holding that discretionary powers may be implied, if not granted expressly, and asserts that the Third Circuit is thus in conflict with the Fourth Circuit. Pet. at 19. *Luby*, however, relies expressly on a *Fourth* Circuit decision. 944 F.2d at 1180. Moreover, the *Luby* court makes clear that its reference to implied powers means no more than that no "magic words", such as "discretion is granted", are necessary.

The theory that "magic words" are required for a grant of discretion was also rejected by the very cases petitioner cites as requiring an "express" grant of discretion. See, e.g., *Wildbur*, supra, 974 F.2d at 637 (5th Cir. 1992); *Johnson*, supra, 970 F.2d at 1572, n.2 (6th Cir. 1992). The Fifth Circuit explained in *Wildbur*:

> We reject plaintiffs' argument that a *de novo* standard must apply because of the absence of the word "discretion" * * *. We agree with the District of Columbia Circuit that

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[11] *Baxter v. Lynn*, 886 F.2d 182 (8th Cir. 1989), cited as showing a conflict with the Eighth Circuit, did not even involve court review of a plan administrator's decision regarding benefits. *Baxter* was an interpleader action involving a claim of subrogation rights against an insurer whose policy also covered the beneficiary. The trustees had been granted no authority to make determinations under the plan's subrogation provision.

> "[t]he Court in *Firestone* surely did not suggest that 'discretionary authority' hinges on incantation of the word 'discretion' or any other 'magic word.' Rather, the Supreme Court directed lower courts to focus on the breadth of the administrators' power—their 'authority to determine eligibility for benefits or to construe the terms of the plan' * * *." *Block v. Pitney Bowes, Inc.*, 952 F.2d 1450, 1453 (D.C. Cir. 1992). *Accord, De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1187 (4th Cir. 1989) ("There are obviously no magic words required to trigger the application of one or another standard of judicial review . . .").

974 F.2d at 637.

Petitioner contends that "no case has gone as far as *Bogue*" in finding a grant of discretionary authority. Pet. at 14. A review of cases not cited by petitioner, from the very circuits that petitioner contends are "in conflict" with *Bogue*, shows that *Bogue* is in the mainstream on the issue of plan interpretation. See, for example, *Lakey v. Remington Arms Co., Inc.*, 874 F.2d 541, 544-545 (8th Cir. 1989) (plan found to grant discretionary authority based on statement in severance pay manual that "[t]he following material attempts to interpret the more usual situations that may arise * * *"[12] (*id.* at 546)); *Curtis v. Noel*, 877 F.2d 159, 161 (1st Cir. 1989) (grant of discretionary authority found in provisions that the administrator "shall determine 'which Employees are eligible to participate in the Plan,' and shall 'provide all parties dealing with the Plan an interpretation of Plan provisions on request' "); *Miller v. Metropolitan Life Ins. Co.*, 925 F.2d 979, 983-984 (6th Cir. 1991) (discretionary authority found in provision permitting company to decide whether applicant is "disabled", using medical evidence "satisfactory" to the company); *Bali v. Blue Cross and Blue Shield Ass'n*, 873 F.2d 1043, 1047 (7th Cir. 1989) (same).

Cases involving nonquantifiable and thus inherently judgmental plan terms comparable to the Allied-Signal plan are also in harmony with Ninth Circuit's decision: *Finley v. Special Agents Mut. Ben. Ass'n, Inc.*, 957 F.2d 617, 618-619 (8th Cir. 1992)

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[12] Plaintiff asserted in the Ninth Circuit that this language in *Lakey* is an *express* grant of discretion. AOB at 24.

(discretion authorized by grant of power to determine if employee death resulted from "confrontational situation" and if employee "was engaged in an attempt" to protect life while on official duty); *Anderson v. Blue Cross/Blue Shield of Alabama*, 907 F.2d 1072, 1076 (11th Cir. 1990) (authority to determine which services and supplies are medically necessary and to determine reasonable and customary physicians' fees); *Newell v. Prudential Ins. Co. of America*, 725 F.Supp. 1233, 1241 (N.D.Ga. 1989), affirmed in part, 904 F.2d 644, 650 (11th Cir. 1990) (authority to determine whether hospital services and supplies fell within plan conditions).

The court of appeals was explicit in *Bogue that*

> We do not want to encourage an employer to insulate himself from effective appellate review through the abuse of vague phrases that fail to make clear to the employees that the employer will have the final determination of benefit decisions. Employees who lose promised benefits should not lose the additional benefit of judicial review because their employer reserved discretionary power to itself without making that reservation clear.

976 F.2d at 1325. The court, however, viewed the Allied-Signal plan as "unambiguously" reserving discretionary power. *Ibid.* The court's holding is unremarkable and is correct.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

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